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Contents

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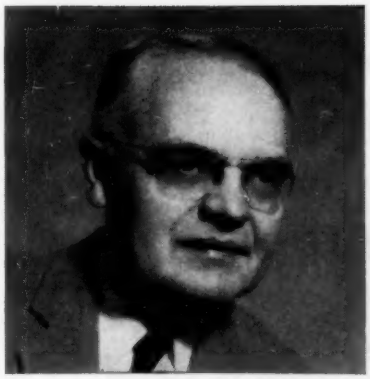

The President's Page

William J. Jameson

■ I have received inquiries from many members in recent weeks with respect to the position of the Association on the inclusion of lawyers in the Social Security program. Some are critical of the Association for failing to take a vigorous stand in opposition and usually express the opinion that the lawyers of the country are "overwhelmingly opposed to this legislation". Others, assuming that the Association has opposed the legislation question the propriety and wisdom of this action. What are the facts?

At the Midyear Meeting of the House of Delegates in 1950 a resolution was adopted opposing any legislation designed to bring self-employed practicing lawyers within the coverage of the Social Security Act. At the Midyear Meeting in 1952 the House adopted a resolution providing that the "matter of approval or disapproval of the inclusion of lawyers under Social Security Act, as proposed in the Lodge Bill 2481, be brought before the Association at its next annual meeting for discussion and vote". At the 1952 Annual Meeting a motion was adopted deferring consideration until the 1953 Midyear Meeting.

At the 1953 Midyear Meeting a motion was adopted to lay on the table until the 1953 Annual Meeting a resolution reciting that the Association "does not favor the inclusion of self-employed lawyers in the Social Security program on an elective or voluntary basis".

At the 1953 Annual Meeting a resolution was presented in the Assembly designed to reverse the position of the Association and approve legislation to bring lawyers within the terms of the Social Security Act. Another resolution proposed that the Committee on Unemployment and Social Security poll bar associations to determine the attitude of lawyers on this question. The Assembly adopted the recommendation of the Resolutions Committee that these resolutions be referred to the Committee on Unemployment and Social Security after defeating an amendment that "it is the sense of this meeting that the Committee on Unemployment and Social Security give favorable consideration to the inclusion of lawyers under the Social Security program".

Upon the recommendation of the Board of Governors the House of Delegates referred back to the committee its report recommending reaffirmance of the position taken by the House in 1950 with the request that the committee report at the Midyear Meeting in 1954 on the desirability of a voluntary plan of Social Security.

At the 1954 Midyear Meeting the Committee on Unemployment and Social Security submitted a progress report, which was well summarized by its chairman, Allen L. Oliver, in the July issue of the JOURNAL. The committee's report to the Annual Meeting in 1954 again will recommend reaffirmance of the Association's action in 1950 in opposing inclusion of lawyers in the Social Security program.

With respect to the polls of state and local bar associations, as of June 19, the results were as follows:

For compulsory	12
Against compulsory	16
For voluntary	18
Against voluntary	12

On the basis of the foregoing, the officers and Board of Governors did not feel justified in authorizing the Committee on Unemployment and Social Security to appear in opposition to the inclusion of lawyers in the Social Security Act. It was the conclusion of the majority of the Board that further action was required by the House of Delegates.

The Board has authorized the Committee to submit to the Senate Finance Committee a factual statement summarizing the action of the House of Delegates and the results of the polls.

It is not the purpose of this statement to present the arguments for or against Social Security for lawyers. The arguments in favor of Social Security were well presented by Dean Larson of the University of Pittsburgh in the November, 1953, issue of the JOURNAL. The arguments against it were equally well presented in the January, 1954, issue of the JOUURNAL and in Mr. Oliver's excellent summary in the July issue.

It cannot be said from the polls taken to date that there is any overwhelming sentiment on the part of the lawyers on either side of this question. In Michigan, for example, the lawyers voted 2825 to 1395 in favor of inclusion. On the other hand, a poll taken by the Illinois

(Continued on page 648)

American Bar Association Journal

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The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the Bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect, so far as possible, the objectives of the organized Bar of the United States.

There are seventeen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Insurance Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral Law; Municipal Law; Patent, Trade-Mark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who is a member in good standing of the Bar of any state or territory of the United States, or of any of the territorial groups, or of any federal, state or territorial court of record, is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement of a member of the Association in good standing and are considered in each case by a Committee on Admissions of the appropriate state. If the applicant is a member of the Bar of the state or territory in which he resides or has his principal office, or is a member of a federal, state or territorial court of record of a state or territory in which he resides or has his principal office, the application is referred to the Committee on Admissions for one of such states or territories. If, however, the applicant is not a member of the Bar of the state or territory in which he resides or has his principal office, the application is referred to the Committee on Admissions for one of those states or territories or is referred to the Committee on Admissions for a state or territory in which the applicant formerly resided and to the Bar of which he was admitted. Upon the approval of an application by a majority of the proper Committee on Admissions, an applicant is deemed nominated for membership. All nominations made pursuant to these provisions are reported to the Board of Governors for election. Four negative votes in the Board of Governors prevent an applicant's election.

Dues are $16.00 a year, except for the first two years after an applicant's admission to the Bar, the dues are $4.00 per year, and for three years thereafter $8.00 per year, each of which includes the subscription price of the JOURNAL. There are no additional dues for memberhip in the following Sections: Bar Activities, Criminal Law, Judicial Administration, Legal Education and Admissions to the Bar, and the Junior Bar Conference. Dues for the Section of Administrative Law, the Section of Antitrust Law, the Section of Labor Relations Law and the Section of Patent, Trade-Mark and Copyright Law are $5.00 a year; dues for the Section of Taxation are $6.00 a year; dues for all other Sections are $3.00 a year.

Blank forms of proposal for membership may be obtained from the Association offices at 1140 North Dearborn Street, Chicago 10, Illinois.

American Bar Association

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The Proof of the Pudding

Jerry Giesler, the well known California Lawyer, tells the following story on himself in his reminiscences of an interesting career. It occurred in a criminal trial.

Let's quote Jerry's own words; "The District Attorney finished the case and I looked at him. He was another good Irishman named Jim Hogan. 'Your Honor,' I said, I am really surprised the District Attorney of this County put the people to the expense to prosecute this poor man. Here is a case, Your Honor, identical with his. In every fact identical, and there is no crime.

So, His Honor said, 'What have you to say about this, Mr. Hogan?' Mr. Hogan got up and said, 'Your Honor, just one thing. This case Mr. Giesler read, is an Appellate Court case. You know, Your Honor, the Supreme Court reversed that case.

Well, so help me, that is the truth. I ought to be ashamed to admit it possibly, but I was just a youngster. The judge was a swell fellow, now Chief Judge Paul J. McCormick of the United States District Court in southern California. He said, "We'll adjourn." He spoke to the bailiff, who came to me and says, "Jerry, the judge wants to see you."

I went in and he said, 'Jerry, you have learned a lesson. Always Shepardize your case—always.' And so I want to tell you I have two Shepard Citators. One at home and one at the office, and to this day I still personally Shepardize every case that I submit to a court or in a brief or anywhere else, because that taught me such a terrific lesson."

From San Francisco Recorder of August 16, 1949

Shepard's Citations
Colorado Springs
Colorado

(Continued from page 643)

State Bar Association, in which 2770 ballots were returned, resulted as follows:

For compulsory inclusion	753
Against compulsory inclusion	1450
For voluntary inclusion	1001
Against voluntary inclusion	1081

On the same questions the Wisconsin lawyers voted as follows:

For compulsory inclusion	349
Against compulsory inclusion	510
For voluntary inclusion	647
Against voluntary inclusion	247

Other polls and resolutions adopted by various state and local associations simply confirm a sharp division in our own ranks on this question.

It should be made clear that the Association has consistently supported legislation of the type of the Jenkins-Keogh bill permitting tax exemption of a percentage of earnings if placed in a retirement fund in trust for old age. We feel that this legislation is highly desirable and would be of distinct benefit to lawyers irrespective of the ultimate action on Social Security.

During the year I have had the privilege of visiting state and local bar associations and law schools in thirty-eight states. I am continually amazed at the breadth, scope and magnitude of the work of the organized Bar and increasingly impressed with the importance of a co-ordinated program among all associations. It has been an exceedingly interesting and pleasant year, but I shall be most happy to rejoin the ranks and serve next year under the able leadership of my successor, Loyd Wright.

In this final page of the current Association year I wish to record my deep gratitude for the excellent co-operation I have received throughout the year from the officers, Board of Governors, headquarters, staff, state and local associations, and the members generally. The committees of the American Bar Foundation working on the construction and financing of the new Center in particular have given unstintingly of their time to the end that the building might be completed and dedicated debt free at the Annual Meeting on August 19. On July 5 contributions received at headquarters and in the hands of state directors totaled approximately $1,400,000, leaving $100,000 to be raised by August 15.

5029 applications for membership were received during the fiscal year ending July 1. Congratulations and thanks to the Membership Committee, the Junior Bar Conference, and all others who joined in attaining our goal.

Views of Our Readers

■ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the *Journal* or otherwise within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves the selection of communications which it will publish and may reject because of length. The Board is not responsible for matters stated or views expressed in any communication.

Supports Position of Professor Atkinson

■ Although I have not been a member of the Association for more than a minor fraction of the time that Mr. Thomas E. Atkinson has, nevertheless I wish to speak out strongly in support of the position taken by him as expressed in his letter published in the June, 1954, issue of the JOURNAL. I know that many other members share these views.

The proper function of a professional association clearly is to concern itself with problems and policies that are professional in nature. There is certainly a borderline area in which lie a number of matters which may be considered either professional or purely public so far as their primary character is concerned. Still it seems unmistakably clear that there is also a very large area in which there are whole categories of problems that are political and public in nature, and of no more concern to the bar association than to any other group of organized citizens.

Since the bar association is, and in order to be a professional organization must be, composed of members of the profession with the most varying and divergent views on matters of public policy, it seems eminently improper for the Association to take an official position on matters that are primarily political or that involve issues of public policy on which there may be partisan or personal differences of viewpoint.

Certainly no one would dispute that it would be the extreme of impropriety for the Board of Governors to declare that the American Bar Association was in favor of the election of the presidential candidate of one major party as opposed to the candidate of the other. There is no more excuse for the Association to be committed to a position on such political matters as statehood for Hawaii or Alaska.

I agree also with Mr. Atkinson concerning the proper function of the JOURNAL. There is today far too little scholarly interest in the principles of law of the sort that are and must be fundamental to the profession if it is to remain professional. The function of a professional journal is, or should be to publish articles of professional interest. Polemics in favor of one or another political candidate, or on one side or the other (or even in the middle) of political issues or matters of public policy which are not of peculiar concern to the profession are not only improper in a professional journal but prevent the publication of articles that are of technical and professional relevance.

There can be little question that it is more exciting, and probably more interesting to most people, to engage in heated political argument than to engage in sober and scholarly examination of technical or professional problems. It is also much easier to dispose of disputes by authoritarian fiat than by the slow and painful process of judicial inquiry and determination under due process. Fortunately, however, the legal profession is dedicated to the latter alternative. In order to maintain this dedication it is obvious that it must, in its professional concern, also be dedicated to the sober and scholarly study of the problems involved in due process as against the popular and heated political polemic, however much more exciting the latter may be.

Consequently when the Board of Governors takes a position on what is essentially a political matter, and when the JOURNAL publishes articles which are essentially partisan in their political nature (regardless of the merits of the specific issue involved), they are doing a disservice to the ideals for which the profession and the Association stand.

LEE LOEVINGER
Minneapolis, Minnesota

The President Replies to Professor Atkinson

■ *President Jameson has written a reply to Professor Atkinson, explaining the Association's attitude on the problem raised by the Professor's letter. The President's letter, printed below, serves also to answer Mr. Loevinger, at least in part.*

■ The problem of determining to what extent the Association should concern itself with public as distinct from legal questions has, of course, troubled the Association for many years. In seventeen years in the House of Delegates I recall a point of order being raised many times. Ordinarily those in favor of the particular proposal took the position that it was within the jurisdiction of the Association, with those opposing the proposal taking the contrary position. In any event, in 1949 the purpose clause of the Constitution was amended to include among the objects "to uphold and defend the Constitution of the United States

(Continued on page 652)

(Continued from page 650)

and maintain representative government" and ". . . to apply its knowledge and experience in the field of the law to the promotion of the public good". While these objectives do not in themselves solve the problem, they have justified the consideration of problems which were clearly outside the jurisdiction of the Association under the original Constitution.

In the first paragraph of your letter to the JOURNAL you refer to the action taken by the House of Delegates endorsing statehood for Hawaii and the treaty amendment. You state you would have made the same objection "if the Board's resolutions had been the other way in each case". No doubt the reference to the Board was inadvertent, but it does suggest a common failure to distinguish between action by the House of Delegates and the Board of Governors.

I do not believe you will find any instance where the Board of Governors has taken action which would commit the Association on controversial questions of the type referred to in your letter. Action on such questions has always been taken by the House of Delegates. The House of Delegates at present is composed of 222 members. Of that group 115 are made up of state and local bar association and affiliated legal group delegates, together with the Attorney General and Solicitor General of the United States and many others *ex officio*. The remaining 107 represent state delegates, Assembly delegates, past presidents and chairmen of the House of Delegates, the officers and Board of Governors of the Association and section delegates of the American Bar Association. It is, I think, a truly representative organization.

It has been my observation that when state and local bar associations have taken any action on a question, their representatives follow such action. Otherwise they no doubt use their own judgment, the exercise of which would ordinarily include a consideration of the wishes of their constituents in much the same manner as Senators and Representatives in Congress.

At the Midyear Meeting of the House of Delegates two jurisdictional questions were raised. The first was a proposal of the Section of Mineral Law with respect to the disposition of public lands. This came before the Board of Governors, and the Board took the position that it was outside the jurisdiction of the Association. By a divided vote this position was sustained in the House of Delegates.

The question of statehood for Hawaii came up in the form of a resolution from the floor of the House and was not considered by the Board of Governors. Prior to the 1949 amendment the Chairman of the House had ruled that this question was outside the jurisdiction of the Association, and the House had sustained that ruling. It was the position of the Committee on Draft, to which the resolution was referred, that the amendment to the Constitution permitted consideration of this problem. I think this conclusion was correct, but I agree with you that there is a question with respect to the propriety of the Association's taking action on this question.

With respect to the Bricker Amendment, I feel that the objectives of the Association clearly permit its consideration and action by the House of Delegates. Again, I should emphasize that this action was taken by the House and not by the Board of Governors. I find also that it has been considered by many state and local bar associations and that in every instance the lawyers have been divided regardless of the position taken by their respective associations.

I cannot help feeling also that entirely apart from the ultimate decision on this question, there has been substantial value in the lawyers and the public alike giving consideration to the effect of treaty law and executive agreements.

Moreover, it has been my observation that in both the American Bar Association and state and local associations there has been an able and intelligent presentation of both sides of the question. That is true also of the American Bar Association Journal and various publications of state bars which I have had the opportunity to read this year.

You may be sure I appreciate very much your views on the general question raised in your letter. I have found, particularly on two or three occasions where my presentation has been in the form of questions and answers, a decided difference of opinion on the extent to which the Association should take a position on public as distinguished from strictly legal questions. In particular, in a discussion in Los Angeles a few months ago one member took the position set forth in your letter, while another argued most vigorously that it was the duty of the Bar to act on public questions. Certainly it is a problem which deserves the consideration of the members of the Association.

WILLIAM J. JAMESON

Foreign Lawyers Need American Law Books

■ Two years ago I was in Japan, the Philippines, Formosa, Thailand, Burma and Indonesia. Last year I was in India, Pakistan and Ceylon. I was sent there by the U. S. State Department under a leader grant to visit with lawyers and judges, with the idea of establishing friendly relations between the legal profession of those countries and America.

These people are hungry for American law books.

They are just starting on the path of constitutional government under written constitutions. Their constitutions are in many respects remarkably like ours and have obviously been written after a study of our instruments. For instance, in a publication about India sent from the Indian Embassy in Washington is this statement: "The preamble to the Indian Constitution bears a striking resemblance to the Declaration of

(Continued on page 653)

(Continued from page 652)

Rights of the American Constitution." The Indonesians say their constitution was "modeled after the American document".

I was told in India that decisions of our courts are constantly being cited there on constitutional questions.

Since I returned I undertook to persuade some of the foundations to furnish law books to the bar associations and courts of the Orient. I have secured some books for that purpose.

I am convinced that many law offices in the United States have duplicates of standard encyclopedias and texts and that likewise there are in the offices books dealing with constitutional law and its development. These books that are gathering dust on the shelves of America could be put to use in the Orient, and if made available, would be used. I am writing you this letter, frankly, with the suggestion that you publish reference to it advising lawyers that if they have books they are willing to send, they tell me what they have and I shall be glad to give them the addresses of courts, schools and bar associations that would appreciate them. I am prompted to make that statement by the fact that during the intervening months since I was in these countries I have had letters from lawyers and judges in many of these countries asking for books on American law.

Their economic level makes it difficult for them to buy them. American books cost a lot in foreign countries. Even if they had funds that could be used for that purpose, there is the question of international exchange and limitations on money that can be sent out of their countries.

The lawyers of America can do a great job if they will make available to men of our profession in the Orient the means of understanding the how and why of our laws. If you wish, I could write a brief article on it, but it may be better that it be handled in this informal way.

ROBERT G. SIMMONS

Supreme Court
Lincoln, Nebraska

Dean Griswold and the Fifth Amendment

■ I have read "The Fifth Amendment: An Old and Good Friend" by Erwin N. Griswold, Dean of the Harvard Law School, in the June number of the JOURNAL.

There is no occasion for Dean Griswold to labor the point that the Fifth Amendment is sound for, of course, it should be retained.

The Dean knocks down his "straw man" and triumphantly asks—"Can there be any doubt that the claim is legally proper?" I answer "Of course not!"

But what of the moral position of such a "teacher"? Why did he not answer frankly and refuse to hide behind the Fifth Amendment? So, too, if questioned about others, if they were also innocent their cases would be the same.

It is useless to discuss the Dean's hypothetical cases except to make some of us who are not in academic circles wonder how the academic authorities deal with such "teachers". The late Senator Taft was sound in saying that socialism and communism as forms of government should be studied in political courses at educational institutions just as other forms of government should be. But how can teachers be so lacking in sound sense as not to understand the Cominform, which is a conspiracy to conquer the world by force under the guise of advocating a political form, *i.e.*, communism? If they are successful, the states of the free world, including the United States, will become satellites like Poland, Czechoslovakia and Hungary.

Congressional committees have received much criticism from academic circles. What effect, if any, has the work of these committees had on helping the academic authorities see more clearly the peril which exists and do something about it so far as the teaching staff is concerned?

In considering the cases of teachers by educational authorities the Fifth Amendment is not involved, but only the question of whether the particular teacher is unpatriotic and a danger to his own country. Academic authorities will neglect this matter to their peril.

WALTER H. BUCK

Baltimore, Maryland

A Retreat from the Constitution?

■ I want to congratulate the JOURNAL for publishing the article by Ralph S. Brown, Jr., in the May issue. With all of its virtues, no one could call the American Bar Association a very democratic organization. I love it very much, and both lawyers and laymen would be much worse off without it. However, I do wish it would sometime look with a jaundiced and skeptical eye on the proposals that are more totalitarian than democratic.

Both the Bricker Amendment and the ruling that a lawyer who invokes the Fifth Amendment should not be allowed to practice betray a retreat from the constitutional protections.

HERBERT JOHNSON

Atlanta, Georgia

Another Comment on Professor Brown's Article

■ Allow me to express my appreciation of Professor Brown's article on "Lawyers and the Fifth Amendment: A Dissent" in the May issue of the JOURNAL.

It is all too easy to succumb to the temptation to assume the worst of those who stand on their legal right not to speak. As lawyers, we should know better, and Mr. Brown's discussion points up what we often forget: that the Fifth Amendment is designed to protect the innocent as well as the guilty. The same is true of the statute of limitations, and I have not yet heard it said that a lawyer who pleads that statute when charged with a crime should be disbarred.

SPURGEON AVAKIAN

Oakland, California

The American Bar Center:

We Have Built a Cathedral

by Roy E. Willy • of the South Dakota Bar (Sioux Falls)

▪ In connection with the forthcoming Annual Meeting of the Association in Chicago, plans have been made by the President and the Board of Governors for a formal dedication on Thursday, August 19, of the two buildings which comprise the American Bar Center. As this article is in the course of preparation, the progress reports from the architects and from the general contractor indicate that the two buildings will be substantially completed, the grounds landscaped and the offices furnished at the time of our Annual Meeting. Toward this goal, the members of the Executive Committee and of the Committee on Plans, Specifications and Construction of the American Bar Foundation have labored long and diligently in order that the members of the Association in attendance at the Annual Meeting might have an opportunity to visit a completed Bar Center and participate in its dedication.

Appropriate and fitting ceremonies are being planned for the dedication, all of which are fully described in the program for the Annual Meeting. Chief Justice Warren will deliver the main address and the ceremonies will be attended by a host of dignitaries including members of the United States Supreme Court and of the federal circuit and district courts. In attendance also will be the majority of the Chief Justices of the forty-eight state courts of last resort, whose Conference of Chief Justices will be in session at the time of the Annual Meeting of the Association. Present also will be deans from many of the law schools of the country, leaders of the American Bar Association—including its House of Delegates—and many other distinguished members of our profession. It promises to be a truly noteworthy occasion and one of great significance to the members of the American Bar Association, through whose individual efforts and by means of whose financial support the American Bar Center has been made possible.

Title to the property upon which the American Bar Center stands was donated by the University of Chicago to the American Bar Foundation, an Illinois corporation created by authority of the House of Delegates. The officers and directors of the American Bar Foundation are identical with the officers and directors of the American Bar Association, thereby giving proper insurance against any future conflict in interest between the two organizations. The American Bar Center is located directly across the Midway from the Rockefeller Chapel of the University of Chicago. The site consists of a frontage of 380 feet on the south side of East 60th Street, lying between Woodlawn and University Avenues, and extending 180 feet south to an alley. The Center consists of two main buildings. The first of these is the Administration Building, which is located at the northwest corner of the site and is set back about 30 feet from the property line on both University Avenue and East 60th Street. The Administration Building is connected with the Bar Research Center by a wing. The exterior design of both buildings is dignified and monumental. They are faced with Indiana limestone and the entrance steps to both buildings are dark gray granite.

On the north parapet at the entrance to the Administration Building is carved an inscription taken from Article I of the Constitution which states the purposes and objects of the Association. Approaching the entrance one can read: "TO UPHOLD AND DEFEND THE CONSTITUTION OF THE UNITED STATES, MAINTAIN REPRESENTATIVE GOVERNMENT, ADVANCE THE SCIENCE OF JURISPRUDENCE, PROMOTE THE ADMINISTRATION OF JUSTICE AND THE UNIFORMITY OF LEGISLATION, UPHOLD THE HONOR OF THE PROFESSION OF LAW, PROMOTE THE PUBLIC GOOD." At the right of the south entrance to the Administration Building is an inscription from Daniel Webster: "THE LAW: IT HAS HONORED US, MAY WE HONOR IT." Over the east window of the lounge on the exterior

of the Administration Building is a quotation from Theodore Roosevelt: "EVERY MAN OWES SOME OF HIS TIME TO THE UPBUILDING OF HIS PROFESSION." In the interior over the entrances to the lounge and the Board of Governors' room off the main lobby on the first floor is carved an inscription from George Washington: "THE ADMINISTRATION OF JUSTICE IS THE FIRMEST PILLAR OF GOVERNMENT."

Equally appropriate inscriptions have been provided for the Bar Research Center. Over the entrance is a quotation carved from the dedication speech made by Justice Jackson when the cornerstone was laid in November, 1953. It reads: "A CATHEDRAL TO TESTIFY TO OUR FAITH IN THE RULE OF LAW." Flanking the entrance to the Bar Research Center is a quotation from William Pitt: "WHERE LAW ENDS TYRANNY BEGINS," and one from Thomas Jefferson: "EQUAL AND EXACT JUSTICE TO ALL MEN." On the south wall of the lobby inside the Research Center is carved a quotation from John Milton: "GIVE ME THE LIBERTY TO KNOW, TO THINK, TO BELIEVE, AND TO UTTER FREELY, ACCORDING TO MY CONSCIENCE, ABOVE ALL OTHER LIBERTIES." The various committees and groups which participated in the selection of these inscriptions sought to express therein the purpose, the aims and the objectives of the work which will be conducted by the Association in the Administration Building and the aims and objectives sought to be achieved through the Bar Research Center.

On the first floor in the main lobby is an Honor Roll, which provides space for the names of lawyers and others who have made contributions toward the construction of the Center. These names are installed on hinged panels with suitable illumination and will serve as a permanent memorial to those whose gifts have made possible the construction of these buildings.

Also in the entrance lobby is a memorial panel commemorating distinguished lawyers now deceased, whose names have been perpetuated by special gifts made in their memory. In both the Administration Building and the Research Center are many separate memorials representing gifts made in memory of distinguished members of our profession whose services to the Association, to the Bar and to their country have here been perpetuated.

Flanking the main entrance to the Administration Building are eight sculptured panels. They are symbolic in form and commemorate many landmarks in legal history, including the Mosaic Code, the Code of Hammurabi, the Code of Justinian, the Magna Charta, the Constitution and the Writ of Habeas Corpus.

At the north approach to the Bar Research Building is located a 50-foot aluminum flag pole, and a 20-foot by 50-foot reflecting pool has been installed in front of the Research Center. The entire exterior of all buildings is floodlighted for the purpose of protection against vandalism as well as for the creation of an imposing structure by night. The lawn surfaces are watered by an automatic sprinkler system which is clock controlled. The landscaping will not be finally completed at the time of the formal dedication and the lawn area, which has been planted for the dedication, is not in permanent form.

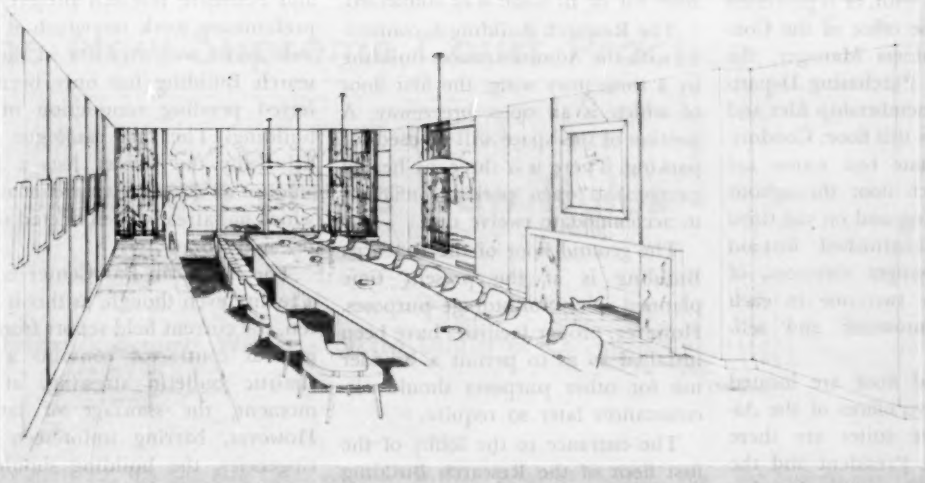
The Administration Building consists of three stories and a ground floor. As both structures are completely air-conditioned, the amount of mechanical equipment contained on the ground floor is extensive. There also will be found the mail production line, which includes sufficient duplicating machinery to serve not alone the Association proper but likewise its seventeen Sections, various committees, the Bar Research Center and the affiliated organizations that will be housed in the Administration Building. The various rooms assigned to the mail production line have been laid out so as to insure the utmost in efficiency and economy. From the ground floor are two passenger elevators sufficient in size to provide for moving of all articles of furniture as well as larger mail cartons. For daily bulk mail, a dumb-waiter has also been provided.

A modern kitchen and a dining room have been installed on the ground floor. The kitchen has been equipped so as to make it available for outside catering. Its facilities are sufficient to provide adequately for luncheons or dinners for small groups, comparable in size to the Board of Governors or Section Councils. The adjoining dining room will seat approximately forty people and is primarily intended for the use of the Association's staff.

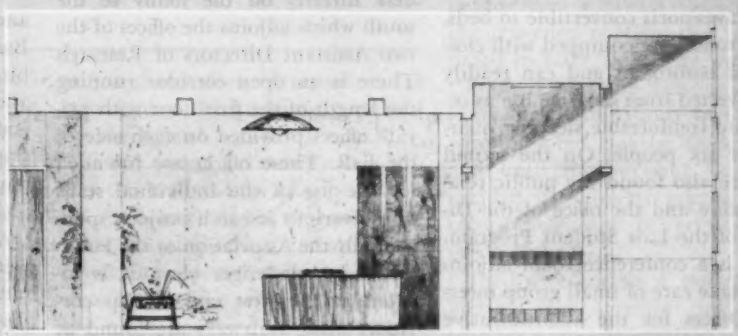
The main entrance of the Administration Building faces north on 60th Street. On the right as you enter the well-proportioned lobby is the receptionist, who also serves as switchboard operator. To the left is the entrance to the Board of Governors' room and adjoining lounge. This room will be dedicated as a memorial in honor of the late Governor Nathan L. Miller, of New York, and its furniture, fixtures and furnishings reflect the generosity of the donors, who have spared no expense in insuring that the room will be an outstanding memorial to the distinguished lawyer to whose memory it is dedicated. The table in this room is custom made and provides comfortable space for the seating of twenty-six people. It has been designed in sections so that the two ends may be detached for use in the room and adjoining lounge for small receptions.

The greater portion of all partitions throughout both buildings are movable and, except for a few permanent offices, most of the available office space can be readily adapted to such changed conditions for future use as circumstances may from time to time require. Also throughout both buildings are floor ducts which insure adequate outlets for electrical equipment of all kinds, irrespective of changes made in shifting partitions and furniture.

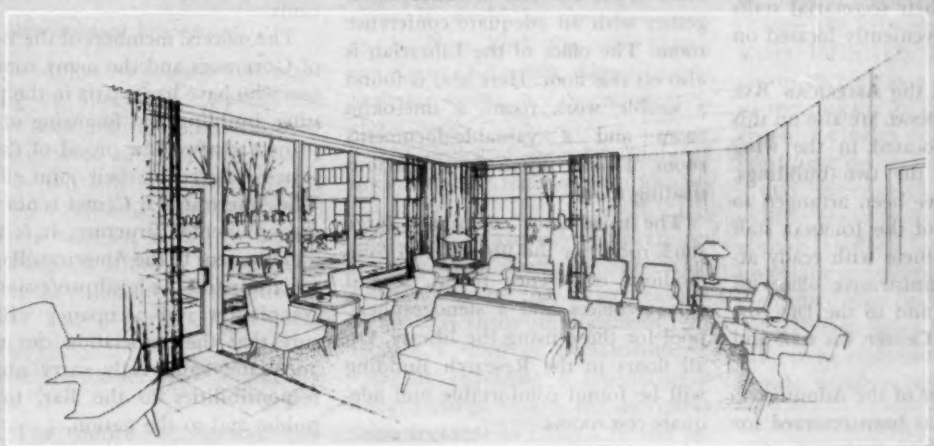
The fact that the American Bar Association is national in its scope requires that as an organization it maintain contact with its members through the use of the mails. As a result the arrangement of the offices of the Headquarters staff, which are located on the first floor, is of such



Board of Governors' Room



Entrance Lobby



Members' Lounge

a character as to insure the utmost in speed, efficiency and economy in handling the great volume of mail which originates with, or is processed by, the staff. The office of the Controller and Business Manager, the Accounting and Purchasing Departments and the membership files and records are all on this floor. Comfortable and adequate rest rooms are provided on each floor throughout the entire building and on the third floor is a well-furnished first-aid room. The passenger elevators, of which there are two—one in each building—are automatic and self-serving.

On the second floor are located the administrative offices of the Association. Private suites are there provided for the President and the Executive Director, with adjoining rooms for their secretarial staffs. Three of these offices are equipped with davenports convertible to beds. These rooms are equipped with closets and bathrooms and can readily be converted from daytime use as offices into comfortable sleeping quarters for six people. On the second floor are also found the public relations office and the office of the Director of the Law Student Program. There is a conference room adjoining to take care of small group meetings. Offices for the administrative assistants who handle meetings, hotel reservations and the work of the Board of Governors, the House of Delegates and their secretarial staffs are likewise conveniently located on this floor.

The offices of the AMERICAN BAR ASSOCIATION JOURNAL are also on this level and are located in the wing which connects the two buildings. These offices have been arranged to meet the needs of the JOURNAL staff and to provide them with ready access to the administrative offices of the Association and to the Director of the Research Center, his staff and the library.

The third floor of the Administration Building has been reserved for offices for such associated and affiliated groups as the American Bar Association is either directly responsible for or in some way connected.

The Research Building is connected with the Administration Building by a three-story wing, the first floor of which is an open breezeway. A portion of this space will be used for parking. There is a three-car heated garage and open parking sufficient to accommodate twelve cars.

The ground floor of the Research Building is at the present time planned solely for storage purposes. However, proper facilities have been installed so as to permit a broader use for other purposes should circumstances later so require.

The entrance to the lobby of the first floor of the Research Building is in the northwest corner and opens to the north. There is a reception desk directly off the lobby to the south which adjoins the offices of the two Assistant Directors of Research There is an open corridor running the length of the first floor with private offices provided on each side of the hall. These offices are intended for the use of the individual staffs of the various research projects sponsored by the Association or the Foundation. A passenger elevator is located at the west end of this corridor, while stairways are found at each end.

On the second floor is located the office of the Director of Research together with an adequate conference room. The office of the Librarian is also on this floor. Here also is found a sizable work room, a microfilm room and a valuable-documents room. Finally there is a spacious reading room.

The third floor contains a large stack room for the library, two commodious conference rooms, several private offices and a stenographers' pool for those using the library. On all floors in the Research Building will be found comfortable and adequate rest rooms.

The American Bar Association and the American Bar Foundation have already approved several ambitious and extensive research projects, the preliminary work on which is now well under way. Activity in the Research Building has only been deferred pending completion of the building. The first catalogue published by the Center lists a large amount of valuable research material which has already been offered to the research library.

The American Bar Center is now a reality even though, as this is written, the current field report from the general contractor contains a pessimistic bulletin stressing, at the moment, the shortage of lathers. However, barring unforeseen contingencies, the building should be ready for dedication and occupancy at the time planned.

The plans, interior decorations and furnishings for the American Bar Center are the work of Holabird & Root & Burgee, architects and engineers, and their competent staff, of Chicago. The general contract was the responsibility of the Turner Construction Company. The architects and the general contractor, as well as the subcontractors, were all impressed with the monumental character of the project and they have all done their part in making the American Bar Center not only a useful, functional structure but also one of monumental proportions.

The officers, members of the Board of Governors and the many committees who have had a part in the planning, building and financing of this project can well be proud of the results produced by their joint efforts. The American Bar Center is not only a monumental structure, it is truly a monument to the American Bar Association and the legal profession. Its completion and occupancy will insure that the Association can more adequately and fully carry out its responsibilities to the Bar, to the public and to the nation.

The New Supreme Court Practice:

A Summary of the New Rules

by **Frederick Bernays Wiener** • of the District of Columbia Bar

▪ **On April 12, the Supreme Court adopted Revised Rules of Practice. The new Rules became effective July 1 and constitute a substantial revision of practice before the Court. Mr. Wiener summarizes the most important provisions of the new Rules in this article.**

▪ Since July 1 of this year, the practice of the Supreme Court of the United States has been substantially simplified—and hence changed. This paper sets forth, for the guidance of the practitioner, the major aspects of the changes made by the new Rules in the fields of most general interest—the new appeal procedure, the simplified certiorari procedure and the new provisions governing briefs and arguments on the merits.[1]

The New Appeal Procedure

The complicated process that made taking an appeal to the Supreme Court such a tedious chore, a process long since abolished everywhere else in the federal judicial system, has been abandoned, and counsel can now take an appeal to the nation's highest tribunal by preparing simply two documents: a notice of appeal and a jurisdictional statement.

Here are the successive steps to be taken:

1. The notice of appeal, prescribed by Rule 10(2) and illustrated in the Appendix to the Rules, consists of three parts: The notice itself, a designation of record and a statement of the questions presented by the appeal.

If the appeal is taken from a federal court, the notice of appeal must be filed, within the appeal time, with the clerk of the court from which the appeal is taken; if from a state court, then with the clerk "of the court possessed of the record". Rule 10(3). In most states, that would be the highest court of the state, but in the remittitur jurisdictions, it would be the trial court (*e. g.*, New York Supreme Court, not Court of Appeals; Massachusetts Superior Court, not Supreme Judicial Court).

The notice of appeal is the only document that the appellant files below.

The advantage of taking an appeal by filing a single paper is of course obvious, the other features of the new tripartite document may require a word of explanation.

(a) By requiring a simultaneous designation of record, the inevitable delay incident to filing a second paper "promptly" (F. R. Civ. P., Rule 75 (a)) is eliminated. No complication results. If the appeal is from the highest court of a state, the contents of the record on appeal will already have been settled. If the appeal is from a federal district court, the unsettled portions can be designated in bulk, as it were, simply as "Transcript of the Testimony", because the eliminations incident to printing need not be made unless and until the Supreme Court has decided it will hear argument; the record need not be printed until then. Rule 17.

(b) By requiring a statement of points, the appellee will know whether a cross-designation is needed and to what extent. The caution for the appellant at this juncture is that he cannot thereafter add to or change the substance of his points. Rules 15(1)(c)(2), 40(1)(d)(2). This means an end, as a practical matter, to the practice of filing a notice of appeal for delay only; the appellant must have decided to go ahead; and it may be ventured that few lawyers will be ready to draft the notice of appeal required by the new Rules unless the appellant has tangibly implemented that decision.

2. The appellee has twenty days, subject to extension for good cause shown, to file a cross-designation of

1. A more elaborate article by the present writer, detailing the obsolescence of the Court's old Rules, outlining the history of Supreme Court Rules generally, and discussing the new practice in all its aspects, will appear in a fall issue of the *Harvard Law Review*.

record. Rule 12 (1). That is the only paper the appellee files below.

3. It then becomes the duty of the appellant to docket the case, within sixty days after the filing of the notice of appeal (subject to extension for good cause shown) by filing in the Supreme Court the certified record together with forty printed copies of his jurisdictional statement. Rule 13.

The appeal is then perfected, subject to the entry of an appearance by counsel for the appellant and payment of the $100 docket fee.

4. The contents of the jurisdictional statement are prescribed in detail by Rule 15. But counsel should bear in mind that it is not sufficient simply to comply with formal requisites. He must make an affirmative showing that "the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution". Rules 15 (1)(e), 15(1) (f). In other words, the argument portion of the jurisdictional statement is very much like the argument portion of a petition for certiorari: it must stress the importance of the case.[2]

5. If for any reason the appellant has failed to perfect his appeal either party may move, in the court below, to dismiss it (Rules 14(1), 14 (2)), and if for any reason the lower court denies the motion, the appellee may clear the record by resort to the docket-and-dismiss procedure in the Supreme Court. Rule 14 (3).

6. Assuming, however, that the appeal is duly perfected, but in appellee's view is insubstantial, the latter's remedy is the filing, in the Supreme Court in printed form and not in the court below in typewritten form as heretofore, a motion to dismiss or a motion to affirm, the grounds for which are spelled out in Rule 16 (1). The time for such a motion has been extended to thirty days from receipt of the jurisdictional statement, to correspond to the time for filing a brief in opposition to a petition for certiorari.

7. If such a motion is filed, then the appellant has twenty days to file a brief opposing the motion. Rule 16(3).

8. Thereafter, the Court will enter an appropriate order, either noting probable jurisdiction, postponing consideration of the question of jurisdiction to the hearing of the case on the merits, affirming the judgment below, or dismissing the appeal. If the order is in either of the first two forms, the parties proceed to designate the portions of the record to be printed (Rule 17), and the case will be argued. If, on the other hand, the order affirms the judgment appealed from or dismisses the appeal, the lawsuit is over.

The New Certiorari Procedure

The salient feature of the new Rules with reference to procedure on certiorari is the abolition of the former expensive and often time-consuming requirement that there be filed with the Court and served on the opposing side printed copies of the full record as made below.

Once again, the successive steps that are necessary are set forth here.

1. The only requirement is that the petitioner file, with forty printed copies of his petition for certiorari, one certified copy of the record below. Rule 21 (1).

2. It is not necessary, as heretofore, to serve a copy of the record on the respondent (Rule 21(1)), for the reason that, by the time a case reaches the certiorari stage, the respondent has available to him just as much of the record as the petitioner. But, in order that the respondent may know precisely what the petitioner has filed, it is provided that the petitioner must notify all adverse parties of the contents of the record he has filed in the Supreme Court. Rule 21 (2).

3. The petitioner has a number of options with respect to the record. If he seeks review of a judgment rendered in an appendix jurisdiction, where portions only of the trial record are printed on appeal, he can satisfy the filing requirement by submitting the printed appendices or joint appendix, plus proceedings in the court below, which may additionally be accompanied, at the time of filing or later, by the remainder of the record below. Rule 21 (3). He has a further option: If the record was printed for the use of the court below, as it will have been in most federal courts and in some state courts, he may file, in addition to the minimum requirement, nine additional copies of the printed record. Rule 21 (4). If the court below operated on the appendix basis, then this option can be exercised by the filing of nine extra copies of the printed appendices. Rule 21(4).

4. The form and contents of the petition for certiorari are prescribed in detail by Rule 23 (1), which makes two significant departures from the earlier practice.

First, to implement the relaxation as to printing of records, it is required that the opinion sought to be reviewed must be included as a part of the printed petition, and, if nine extra printed records are not furnished, other pertinent opinions below, including those of administrative agencies in the case, must likewise be presented in printed form in or with the petition. Rule 23(1) (i). Similarly, the portions of state court records showing the raising of the federal question must, if nine extra printed copies of the record are not filed, be presented in printed form in or with the petition. Rule 23 (1)-(f).

The second important change is the abolition of the old supporting brief; the Rule now adopts the form of the government petition for certiorari, first devised by Solicitor General Thacher, wherein all the arguments in support of the petition are set forth in the body of the petition. Rule 23(3). A portion of this provision is important enough to be quoted: "No separate brief in support of a petition for writ of certiorari will be received, and the clerk

2. This was first pointed out in these pages some years back, by the present Clerk of the Supreme Court, in a paper that still bears careful study. Willey, "Jurisdictional Statements on Appeals to U. S. Supreme Court", 31 A.B.A.J. 239 (1945).

will refuse to file any petition for writ of certiorari to which is annexed or appended any supporting brief". Lawyers should therefore be extremely careful not to continue to follow the older forms in their possession, or set out in textbooks or manuals, that still include a supporting brief.

5. The respondent, as heretofore, has thirty days within which to file a brief in opposition. Rules 24 (1), 24(2).

6. The respondent also has effective remedies in the event he is not satisfied with the record as filed by the petitioner, the contents of which are made known when the petition is filed. Rule 21 (2). If there was a printed record below and the petitioner does not exercise his option of filing nine extra copies thereof, the respondent may file those copies. Rule 21(4). If the record was not printed, but the petitioner filed less than a complete record, the respondent may file additional portions thereof. Rule 21(6). These options may be exercised at or before the time that the brief in opposition is due.

7. Finally, to cover the exceptional case, it is provided that the Court may, on its own motion or on motion of either party, require the printing of the entire record, or of designated portions thereof, before ruling on the petition. Rule 21 (7).

8. Thereafter, if the petition is granted, the parties proceed to designate the record for printing. Rule 26. At this juncture the parties may stipulate the inclusion in the printed record of additional portions of the record below (Rule 26 (3)), or, if no stipulation is possible, the respondent may move to require the certification of additional portions of the record. Rule 26 (5). That motion replaces the former writ of certiorari to correct diminution of the record, which Rule 32 specifically abolishes.

Briefs

The format of briefs on the merits is prescribed by Rule 39, and their contents are regulated in detail by Rule 40. In general, these requirements simply codify approved practice. One change requires that there be placed on the cover the name and address of the member of the Bar who is counsel of record and on whom service is to be made. Rule 39(2). Other individual names, the implication being that firm names are not desired, may be added as heretofore.

There is still no restriction as to the length of Supreme Court briefs. But Rule 40(5) contains an admonition warranting quotation in full: "Briefs must be compact, logically arranged with proper headings, concise, and free from burdensome, irrelevant, immaterial, and scandalous matter. Briefs not complying with this paragraph may be disregarded and stricken by the court."

The important and welcome innovation with respect to briefs on the merits is in the increased time limits now established. Under the old practice, particularly in view of the relatively small number of cases that the Court has lately been hearing, counsel were often badly pushed.

Under the new Rules, the brief for the appellant is not due until thirty days after receipt of the printed record, or until forty-five days after the order as to jurisdiction or granting certiorari, whichever is later. Rule 41 (2). (The differing time limits are designed to equalize the situation where a party has already available the necessary number of printed records below, requiring only the insertion of the final opinion, with those where the record below was either entirely or partially unprinted.) If the order that indicates that argument will be had comes too late in the term for the case to be argued in that term, then the Clerk so notifies the parties, and the appellant or petitioner need not file his brief before August 25, unless thirty days have not yet elapsed after receipt of the record. Rule 41 (1).

The appellee or respondent need not file his brief until thirty days after receipt of the one filed by his adversary (Rule 41 (2))—a welcome respite from the former all-too-short two weeks. And since cases will not normally be calendared until two weeks after the brief of the appellee or respondent has been filed (Rule 43 (1)), the appellant or petitioner can prepare his reply brief in at least slightly more leisurely fashion than heretofore.

Frederick Bernays Wiener was born in New York and educated at Brown University and the Harvard Law School. After practice in Rhode Island, service in the Department of Justice, nearly five years in the Army, and three years in the Solicitor General's office, he now has his own law office in Washington, D.C., handling appellate and military law proceedings. He is the author of *Effective Appellate Advocacy* and was the Reporter for the Supreme Court's Committee on Revision of its Rules.

Oral Argument

The familiar time limits for oral presentation, one hour per side in the ordinary case, and thirty minutes per side in the summary calendar case, are continued (Rules 44(3), 44(4)). It may be expected that the Court will be as reluctant as in the past to grant more time and it may be stated with certainty that time taken from counsel by judicial eminent domain, *viz.*, by questions from the bench, is not compensable.

There are three innovations, all

aimed at facilitating and emphasizing the proper function of oral argument.

First, it is specifically stated that "The court looks with disfavor on the submission of cases on briefs, without oral argument, and therefore may, notwithstanding such submission, require oral argument by the parties." Rule 45 (1).

Next, although it is still permitted for two counsel to represent the same party orally, Rule 44(4) now states for the Court, what some of its members had earlier said for themselves, that "divided arguments are not favored".[3]

And, finally—though perhaps most important of all—this admonition has been laid down in Rule 44 (1): "Oral argument should undertake to emphasize and clarify the written argument appearing in the briefs theretofore filed. The court looks wih disfavor on any oral argument that is read from a prepared text."

Other Features

As has been indicated, this paper simply touches the highlights of the Supreme Court's new Rules, and does not pretend to cover all features of the new practice. In general, however, it may be said that the revision greatly assists the practitioner, because it spells out and regularizes much of the practice that formerly rested only in tradition. "Ask the Clerk's Office"[4] is still good advice in the unusual situation, but for every point that can arise in over 95 per cent of the cases, "Read the Rules" supplies a clear and easily found answer, with far less trouble to all concerned.

3. See Justice Robert H. Jackson, "Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations", 37 *A.B.A.J.* 801 (1951): "If my experiences at the bar and on the bench unite in dictating one imperative, it is: Never divide between two or more counsel the argument on behalf of a single interest. . . . When two lawyers undertake to share a single presentation, their two arguments at best will be somewhat overlapping, repetitious and incomplete and, at worst, contradictory, inconsistent and confusing. . . . No counsel should be permitted to take the floor in any case who is not willing to master and able to present every aspect of it. If I had my way, the Court rules would permit only one counsel to argue for a single interest. But while my colleagues think such a rule would be too drastic, I think they all agree that an argument almost invariably is less helpful to us for being parceled out to several counsel." Compare the language of Rule 44(4), quoted in the text.

4. Stern and Gressman, *Supreme Court Practice*, page 6 (1950). A revised edition of this excellent manual, necessitated by the changes in the Court's Rules, is now in preparation.

Miriam Lashley Wins Ross Prize Essay Contest

■ For the second straight year, a woman is the winner of the annual Ross Prize Essay Contest. She is Miriam Lashley, a native of Tulsa, Oklahoma, now with the legal department of the Sinclair Oil and Gas Company. The subject of this year's essay was timely: "The Investigating Power of Congress, Its Scope and Limitations". Miss Lashley's was chosen from a field of forty-two entries.

Miss Lashley is a graduate of Wellesley College, Wellesley, Massachusetts, where she majored in political science. She was graduated with honors in political science in 1942, and is a member of Phi Beta Kappa and a Durant scholar.

She entered the Yale Law School and, under the accelerated war-time course, received her law degree *cum laude* in the summer of 1944. While at Yale, she was Editor-in-Chief of the *Yale Law Journal*, the first woman ever to receive that honor. She is a member of the Order of the Coif.

After her admission to the Oklahoma Bar, she worked as an attorney in the Appellate Division of the Tax Section of the Department of Justice from September, 1944, until April, 1945. In 1945, she became a staff assistant with the American Red Cross overseas, serving in France and Germany.

In September, 1946, she returned to Oklahoma and became a lecturer in political science at the University of Tulsa. She practiced law with her father in the firm of Lashley and Lashley until she joined the legal staff of the Sinclair Oil and Gas Company.

Miss Lashley will deliver a summary of her essay before the Assembly of the American Bar Association during the Chicago meeting. The complete essay will appear in a forthcoming issue of the JOURNAL.

The Ross award was established in 1928 through a bequest of $100,000 made by a member of the Association, the late Judge Erskine M. Ross, of Los Angeles. The subject for the yearly essay is selected by the Board of Governors of the Association and the entries are judged by a special committee appointed by the President.

Rivkin Studio

Last year's winner, Mrs. Lois G. Forer, of Philadelphia, was the first woman to win the contest.

The Lawyer Referral Service:

The Medium-Size and Smaller Communities

by **Theodore Voorhees** • of the Pennsylvania Bar (Philadelphia)

▪ **This is the second of two articles reporting on the latest developments in the lawyer referral program. Last month, Mr. Voorhees, who is Chairman of the Association's Committee on Lawyer Referral Service, reported on lawyer referral services in metropolitan areas.**

▪ The referral plan started in the large cities, has slowly spread to those of medium-size and is now beginning to interest lawyers in smaller communities.

Ninety services have been established to date. Of the ten largest cities in the country, only Washington, D. C., has yet to establish a referral service. In the next twenty-five, all but six (Houston, Seattle, Kansas City, Memphis, Portland, Oregon, Birmingham, Alabama) have adopted some form of plan. Among the larger cities of the country, there remain about fifty which have yet to set up plans, but at least twenty bar associations among them have services under consideration at this writing and the first part of the American Bar Association's effort to make legal advice available to *all* persons of moderate means seems reasonably close to accomplishment.

Development of the referral plan in smaller communities is now commencing. During the last year or two many inquiries have been directed to the American Bar Association about its feasibility outside the big city. Three questions are asked: Is there any need for it in the smaller community? How can it be made to operate there? How can it be financed?

Need Is Proved Wherever Services Are Set Up

It is not merely in the smaller communities that lawyers are sometimes heard to insist that there is no need for the referral service: At one time there was a similar outcry in New York, Chicago and Los Angeles. Yet in every community, large or small, where a referral plan has been tried out, the service has had clients and the overwhelming majority of them have never consulted attorneys before.

Those who have lived in towns and small cities all their lives may well number an attorney among their acquaintance; the chances are that they went to high school with some boy who later became a lawyer. Yet there is a vast difference between the bare acquaintanceship of a prospective client and a member of the Bar and an actual established relationship of lawyer and client. There is no evidence that proportionately more people have their own lawyers in small cities than have them in large; nor is there any reason to believe that people are less likely to encounter legal questions in small places than in the metropolis.

Finally, the population is not necessarily more stable in the small city than in the large. New York gained 400,000 new citizens between 1940 and 1950 but that was an increase of only 5 per cent. Corpus Christi's population went up 51,000 in the same period, an increase of almost 100 per cent while Baton Rouge more than tripled its 35,000 population. When strangers come into cities and towns in such extraordinary numbers, how can the Bar continue to insist that everybody knows a lawyer?

Of course, a referral service in a town of fifty thousand will not have as many clients as will one in a city that is ten times as big. It is equally obvious, however, that the number of lawyers will be proportionately smaller, and there is no apparent reason why a member of a referral service panel in a large city should serve more referred clients than one on a panel in a small. If the bar association in the latter makes a more determined effort to inform the public of the existence of its service than does its larger counterpart, the small town lawyer will have the greater number of referred clients. Thus in Grand Rapids the panel members receive six cases a year from the bar association; in Pittsburgh, where there

has been little publicity, they are getting only one.

The matter comes down to this: If all or substantially all the people of a community know the members of the Bar and have made a practice of consulting them, if the community is a backwash with no new inhabitants moving in and if the Bar is truly satisfied that the people of its home town are entirely appreciative of the need for legal guidance in connection with the modern complexities of life, then consideration of a referral plan should be put off until next year. If, on the other hand, the Bar of a community should observe that many people are handling transactions with real legal implications and are not securing legal advice, that some of them are not seeking such advice because they fear that the services of an attorney are beyond their means and that people are consulting their banks or real estate agents about matters involving points of law, then perhaps the referral plan should have something to offer even though the community may not be thickly populated.

No bar association should reject the adoption of some form of plan merely because the welfare of only a small number of prospective clients is to be served. Is it not just as important that five, fifty or two hundred people who would not otherwise receive it be furnished legal advice in smaller towns as for ten or twenty times that many to obtain service in large ones?

The Operation of the Plan Need Not Be Elaborate

Bar associations outside the metropolises who have heard how New York and Philadelphia have opened lawyer referral service offices and have hired attorneys to run them on a full-time basis have reached the easy conclusion that such is not for them. Of course it is not. No city of under 200,000 population requires a full-time employee to interview the clients and make the referrals. Few in that category would require anything elaborate in the way of mechanics.

Some agency to make the referrals is necessary whether the bar association is large or small. There are any number of possibilities outside the big cities but a few may be cited merely as examples:

1. *Someone in the courthouse*—Every town hall should have at least one personality who commands the respect of the Bar. He may be a court clerk, a trial commissioner, a law librarian, a prothonotary, a county commissioner, the chairman of council or any other person who has regular hours in or near the place where the courts are housed. He need not be a man of superior education and intelligence. His duties need go no further than to maintain a list of lawyers, act as a sort of receptionist for the bar association, direct the inquiring client where to go, and keep elementary records with regard to the applicants who call on him. If he is articulate, he can explain the service to those who make use of it. If he is not, he need do little more than hand them a leaflet which spells out the simple procedure that the Bar has provided and give them the name of the next lawyer on the list. The fact that his other employment does not carry some exalted title should not be important. He may be given a second title as the representative of the bar association which will build him up in the public eye. So long as he has real integrity and the confidence of the Bar, he should meet the requirements of the job.

2. *A bar committee*—In a number of county seats, the Bar has adopted a committee plan which was originally worked out in Allentown. A committee of young lawyers undertakes to make the referrals with the first man assuming responsibility for Monday, the second for Tuesday and so on. In small communities two or three applicants would be the maximum to be served in any one day and the burden of interviewing and referring them to the next lawyer on the panel list should not be too great.

If the bar association has an office, the applicant would go there in the first instance and the person in charge would then call the committeeman of the day and request him to come to that office. Obviously the members of the committee should all be within close range. As an alternative, the committee members might undertake to stay in the bar association office or other designated place for an hour or two on their respective days. The public should be advised of the hours of operation and, again, the burden on the members of the committee should not be great.

3. *A bar association official*—In small communities where it is not anticipated that there will be more than one or two applicants a week, the president of the bar association may undertake to make the referrals. This system has been tried out successfully in Fayette County, Pennsylvania, which has a population of 190,000, though Uniontown, the county seat, has only 20,000 inhabitants. Jealous members of the Bar may fear that their president may thus obtain undue publicity, and if the association has an executive secretary or clerk on its payroll, that employee may perhaps be preferred.

4. *A judge*—A number of public-spirited members of the judiciary have taken an active part in seeking the establishment of referral plans in their respective communities and without doubt in smaller communities a judge could be persuaded to take on the job of making the referrals if no other person should appear to be available. It is not suggested that a judge should be asked to assist the Bar in this manner unless the number of people whom he will be required to interview is small, and a busy judge should be asked to serve only upon a temporary basis while the service is getting started. Those on the bench are frequently made aware of the need for counsel of many unrepresented people who appear before them. For that reason judges, more than most others, welcome the establishment of a system whereby people in need of representation can be referred to attorneys in an orderly manner and without fear of encountering a charge of favoritism.

5. *Other methods*—In Muskegon, a telephone exchange has been utilized to make the referrals. This and various other possibilities are described in the "Handbook on Lawyer Referral Service", a publication of the American Bar Association's Committee on Lawyer Referral Service. The utilization of personnel of a legal aid society is a solution that may be worthy of consideration.

Financing Can Be on a Very Modest Basis

From the foregoing, it is apparent that the plan can be financed in a small community on an extremely modest basis. It would be folly to hire an attorney or anyone else to operate a service that may expect at the most one or two clients a day. The interviewing and referral of that many people should cause little interference with whatever other duties the referrer may have. It may nonetheless seem appropriate to compensate him for his services, and in one or two communities he is paid a flat rate of one dollar per referral.

The life blood of a referral service is publicity, and that may or may not cost money. In Allentown, where an effective service has been well publicized, the bar association six years ago appropriated five hundred dollars to start it off and the whole of that sum has yet to be spent. The success of the service in the last analysis will depend on the effort of a public-spirited committee to tell the public about it. What a few lawyers may do on a voluntary basis will be worth many paid advertisements. Some money will of course be necessary to print leaflets, and posters, and for telephone and other small expense. The amount needed is within the reach of every bar association in this country.

If it is desired to make the service self-supporting an annual charge of five or ten dollars may be collected from the members of the panel. In Rhode Island all members of the Bar were requested to contribute whether they went on the panel or not. In a number of places the clients are charged a dollar or half-dollar registration fee. That should not be necessary, however, in the smaller community where no open-all-day office is to be maintained.

The establishment of the lawyer referral plan involves considerably more than the sum total of its product—the wills that are drawn, support orders obtained or disputes settled. It constitutes, among other things a message to people everywhere that American lawyers are willing to serve all members of the community and to charge fees that the public can afford to pay.

Unless the lawyers in the smaller bar associations want their big city brethren to be the only ones to publish this message, they must share in the furnishing of the service. To some, the fact that the operation will be small-scale will seem to eliminate the need of further discussion. But most lawyers will rebel at the thought that any man in need of legal help must go without it. We know that that means he may be deprived or partially deprived of justice. If a single client goes to an attorney through a lawyer referral service and otherwise would have gone without advice, the establishment of the service should be deemed worth while.

A Course for Practicing Lawyers

■ A Short Course for Practicing Lawyers is to be offered by the faculty of the Northwestern University Law School for the period of August 9 to 13—the week prior to the Annual Meeting of the American Bar Association held in Chicago. The Short Course to be given by Northwestern is designed for the lawyer in general practice and offers an opportunity for professional study of key developments in several selected fields of law.

Eleven fields of law will be studied including estate tax planning, international law, federal practice, scientific evidence, accounting for lawyers, civil liberties, tax and corporate problems of small business, state judicial administration, antitrust law, property and trusts, and labor law. One of the distinctive features of the course will be the preparation by the faculty of the Northwestern University Law School of special materials which may be read in advance by the lawyers attending. The course is not to be a lecture series. It is to be, rather, a series of active workshop sessions for professional study of current legal problems of importance to the profession.

All sessions of the Short Course will be held in the Law School located on Lake Michigan a few blocks north of the Loop. Each of the sessions will be under the direction of a member of the regular law school faculty who specializes in that field. The eighteen-story dormitory on the lake-shore downtown campus will be opened to the attending lawyers and their wives. Further information about the course can be secured by writing to the Northwestern University School of Law, Lakeshore Drive and Chicago Avenue, Chicago, Illinois.

Mr. Justice Radish on the Jenkins-Keogh Bills

■ **Mr. Albert Haddock, the well-known writer whose litigiousness is responsible for many of the cases in Sir Alan Herbert's *Uncommon Law*, presents another reason for the adoption of the Jenkins-Keogh Bills (which would permit lawyers and other self-employed professionals to set aside a portion of their income in a tax-free retirement fund). Last spring, Representative Eugene J. Keogh, (D., N.Y.), one of the sponsors of the Bills, called the attention of members of Congress to Mr. Haddock's plight. Mr. Keogh's remarks appear on page 3350 of the March 18th issue of the *Congressional Record*. The selection from *Uncommon Law* is reprinted with the permission of Sir Alan Herbert and the Proprietors of *Punch*. Mr. Keogh was speaking on the proposed Internal Revenue Code of 1954.**

Mr. KEOGH. Mr. Chairman, like many who have preceded me, I shall not undertake to discuss the technical provisions of the pending bill. They will for a long time and at length be incorporated in the decisions that will emanate from the tax and other courts of the country. I should, however, like to devote just a few moments to refer to an obvious omission in the pending bill, an omission that I might point up by reading a few paragraphs from the very learned decision of Mr. Justice Radish in the mythical case of Haddock and others against the Board of Inland Revenue, written by A. P. Herbert, English barrister and one-time member of the House of Commons, in Mr. Herbert's Uncommon Law.

Mr. Justice Radish first sets forth the issues in the case as follows: . . . .

The appellant in this case is a Mr. Albert Haddock, a pertinacious litigant whom we are always glad to see. And let me say that it gives me pleasure to see the Commissioners, so often and for such poor cause the initiators of litigation, for once upon their defense.

Mr. Haddock asks for a declaration that he is, and has been for some years, entitled to certain allowances or deductions for income-tax purposes under the heading of (a) expenses and (b) wear and tear of machinery and plant; and on the assumption that he is right he claims that a considerable sum is owing to him in respect of past years in which the Commissioners have refused to grant him such allowances.

Mr. Haddock appears on behalf of the whole body of authors, artists, and composers, and the position of a large number of creative brain-workers will be affected by our decision. . . .

Next, as to wear and tear. One of the constant disadvantages of the author's trade is that he is a one-man business, at once his own employer, designer, technician, machine-minder, and machine. Once the soap manufacturer has equipped and organized his factory he may relax; a week's holiday; a month's illness will not suspend the output of his soap or the growth of his income. But when the author stops, the machine stops, and the output stops. He is unable, on holiday, in sickness, or in age, to depute his functions to any other person. Here is one more reason why a hundred pounds earned by the author should not be treated and taxed on the same terms as a hundred pounds accruing as profit to the soap manufacturer. Yet, says Mr. Haddock, since this is done, let it be done thoroughly and logically. The author's machinery and plant are his brain and his physique, his fund of inventiveness, his creative powers. These are not inexhaustible; they are seldom rested (for the reasons given above); the strain upon them increases as the years go by, and in some cases, I understand, is aggravated by late hours and dissipation. If it is proper for the soap manufacturer to be relieved in respect of the wear and tear of his machinery and the renewal thereof (which money can easily buy) how much more consideration is owing to the delicate and irreplaceable mechanism of the writer.

Under this head Mr. Haddock has repeatedly appealed for relief in respect of sums expended on doctor's accounts, on sunlight treatment, on nourishing foods and champagne, and upon necessary holidays at Monte Carlo and Cowes. The Commissioners have refused, and I find that they were wrong.

Under both heads, therefore, Mr. Haddock's appeal succeeds. He estimates that if his expenses be properly calculated on the basis already explained he has never yet made a taxable profit; for at the end of every year of his literary operations he has been a little more in debt than the year before. In every year, therefore, he has been wrongly assessed and unlawfully taxed; and I order the Commissioners to reopen the accounts for the past 7 years and repay to Mr. Haddock the very large sums owing to him.

Mr. Keogh concluded by declaring that Mr. Haddock's plight is the plight of every professional and self-employed person in this country, the great body of millions of people who either cannot by law or who choose not to operate under the corporate form of business.

The Organized Bar of America:

The Beginning of a New Day

by **E. Smythe Gambrell** • of the Georgia Bar (Atlanta)

▪ **Addressing the Pacific Northwest Regional Meeting, which was held in Portland, Oregon, in May, Mr. Gambrell, who is Chairman of the Association's Committee on Regional Meetings, traced the accomplishments of the organized Bar from its humble beginnings to its present place in professional life. He predicted that the organized Bar's greatest era is yet to come.**

▪ Every community, state and region is built in the image of the people who live in it. It is changed, improved and transformed by the magic of the vision of its leaders. They and the people working with them can make it what they want it to be. Here, this week, representative lawyers from the eight states of this majestic region have come together in an atmosphere of conviviality and good fellowship to make sure that law keeps pace with the developments in the world about us. Those who are here may be called the aristocracy of the Bar—an aristocracy whose selection is based upon public service and achievement in keeping with the highest traditions of our profession.

My pride and pleasure in participating in this great meeting have a simple source. They spring from the pride which lawyers everywhere have begun to feel in the American Bar Association and the ideals for which it stands.

The persistent march of civilization and the amazing developments in all fields of human endeavor have made the life of the lawyer of today one of progressive experience and increasing responsibility. The things which are happening in the economic and social order are reflected in the legal order.

With social change comes the demand that the law satisfy the needs which the change has created—and so the great problem of jurisprudence in the modern world is the reconciliation of the demand—somewhat paradoxical—that the law at once have logical continuity with the past and adaptability to the present and future. "Law", says Dean Pound, "must be stable, and yet it cannot stand still."

We who are heirs of the common law are coming more and more to realize that law is not the embodiment of inexorable scientific formulas and to understand the words of Mr. Justice Holmes, who said a half century ago: "The life of the law has not been logic: it has been experience."

Law depends on social progress, and social progress, in a very real sense, depends upon the correct creation, interpretation and administration of law.

The growth of law and of legal service must be as unceasing as life itself. There will always be problems to challenge the legal profession—work for it to do. Justice Cardozo charmingly has said:

> The inn that shelters for the night is not the journey's end; the law, like the traveler, must be ready for the morrow. It must have a principle of growth.

Our institutions, to survive, must realize and effectuate the progressive ideals that constitute our national faith. The rivers of our national life will flow onward and not backward. Perhaps our greatest task is to find a happy balance between liberty and authority in the modern state. The deepest issue of our time is whether civilized peoples can and will maintain a free society.

In the field of substantive law, leadership is needed in the perfection and application of statutes to encourage industrial and commercial co-operation and at the same time guard against monopoly; to maintain the proper relationship between capital and labor; to raise revenue; to regulate public service organizations; to promote safety, morals, health, and the general welfare; to promote internal and international peace and security; and the working out of countless other adaptations of law to meet the constant changes in our social and economic

life. The development of our country, in some respects, has outrun the laws. There are some who feel that, in the current era of scientific achievements, we have produced a race of nuclear giants and social and ethical infants.

We cannot longer face with complacence the demands for state court procedural reform, expecting economic and social relations to adjust themselves to a technique that denies justice by delaying it. Too frequently we have preserved the absurdities, as well as the excellencies, of the procedure that has been bequeathed to us, and have failed to make it responsive to the needs of the practical age in which we live.

It is difficult to believe that in many states in this enlightened age, men sentenced to death have been denied judicial review because, although the record was eloquent with objections carefully noted and passed upon by the trial judge, the bill of exceptions failed to do homage to the verbal fetish, "Exception". It ill becomes us to speak derisively of the now-discarded superstitions of primitive peoples and at the same time accept as inevitable the relics of their legal procedure.

Litigation is so hedged about with expense and delay that people in large numbers are seeking to settle their controversies by the administrative method or by arbitration in order to avoid the lawyer and his forum. Jury trials, in many situations, have outlived their usefulness. The requirement of unanimous verdicts in civil cases can hardly be justified. Distinctions between law and equity courts and their procedure should be abolished.

Fortunately, inquiry into the operation and effect of laws is being substituted for faith in their fixity. The ends and consequences are becoming the dominant interest in jurisprudence. And no one ought to complain if a practice or procedure in our profession is called upon to justify its continued existence. Chief Justice Hughes, in speaking of the preparation of the new rules of federal practice in 1934, said:

> It is manifest that the goal we seek is simplified practice which will strip procedure of unnecessary forms, technicalities and distinctions, and permit the advance of causes to the decision of their merits, with a minimum of procedural encumbrances.

The federal rules in some instances have served as models for state procedural reform. In many states there is need of well-organized departments of justice. All states ought to have co-ordinated judicial administration under the supervision of their supreme courts; and the judges ought to be empowered to function as ministers of justice, and not merely as referees. Much remains to be done in the field of criminal procedure, particularly in connection with juvenile delinquency and prison administration.

The Lawyer Is the Natural Leader

In a democracy the lawyer is the natural leader from whom and whose conduct the attitude of the community toward the law ought largely to be derived. His duty extends beyond his clients and to the public at large in the shaping of our polity. And he should be stirred by an enlightened self-interest, for the people will neither patronize nor endure a system of justice that is tardy, inefficient, or insincere.

Where are we aiming? Where are we going? We recognize the need for continuing improvement of law and its administration. We have said that we wish the entire Bar to have a voice—a commanding voice; that we desire an organized and concentrated influence; that we desire to improve the tone of the Bar, to stiffen its self-respect, to secure a wider acceptance of professional standards.

If the lawyer is to supply the leadership and render the service that is demanded in a changing and increasingly bewildering world, manifestly he must have background and character and a general education superior to the requirements of the past. We need more than ever an adequate philosophy of law. The American law school of the present day is unequalled in imparting technical knowledge. But since law is, or should be, an outgrowth of life in all its phases, it would seem that we should place greater emphasis on culture and the breadth of human understanding. We must inculcate in the candidate for admission to the Bar a sense of the peculiar responsibility of his position. He must appreciate the public aspects of a lawyer's career. He must know more of history, of government and of science, and he must be familiar with our literature and our ideals. He must know that the law is more than a collection of doctrines. He must from time to time lift his eyes from law books and look out the window on the world he seeks to serve.

The traditional right of every American boy and girl to enter the legal profession must be qualified by a consideration of the public's right to competent and honorable service and to protection from the uneducated and unethical practitioner.

Faced with growing responsibilities, we may appropriately take stock of ourselves, our equipment and our accomplishments, although, as someone aptly has observed, "Nothing requires greater heroism than to see one's own equation written out."

Early Lawyers Were Individualists

Our forefathers brought the English common law to the Colonies, but with it a love of freedom and a distinct aversion to the restraints imposed by then-existing institutions. At the beginning there were few highly educated lawyers in America, and the profession, for the most part, was made up of uneducated frontier individualists. A sense of group responsibility was lacking. There were no bar organizations, no self-imposed canons of ethics, no professional inhibitions. There was no Bar in the sense of the term as used in England and Scotland and continental Europe. For more than two centuries the lawyers in America were merely an aggregation of individuals freely engaged in money-making activity. While, as individualists in a new land, without educational or other

traditions, the lawyers played a large part in the establishment and protection of our institutions, they lacked group consciousness, group opinion and group voice until more than a hundred years after the Declaration of Independence.

Late in the nineteenth century this country began to emerge from frontier conditions and a frontier philosophy. Community life and a sense of community responsibility began to develop. In many cities and states, the lawyers discovered they had interests in common. In 1878 there were fifteen state and local bar associations worthy of the name. In January of that year, Simeon E. Baldwin launched a movement in the Connecticut Bar Association to bring about a national association of the legal profession. As a result of his suggestion, seventy-five lawyers from all parts of the country assembled at Saratoga Springs, New York, on August 21 and formed the American Bar Association. During the seventy-six years that have elapsed since its organization, the Association has grown in direct membership to approximately 51,000 lawyers and has developed a vast program of leadership and service through committees and sections devoted to research, wholesome propaganda, and other professional activities. The members are carrying on this program at an annual expense of more than $500,000 and through unlimited voluntary work. We are now about to complete in Chicago a modern American Bar Association headquarters building and research center which will be the national shrine of our profession in the days ahead. The long-dormant powers of lawyers for self-improvement are vibrant and are being exercised through associational efforts.

The Achievements of the Association

The American Bar Association early advocated higher educational and moral standards for admission to the Bar, and its recommendations have been adopted by more than half of the states. It has been the chief sponsor of a successful movement for the uniformity of state legislation in certain fields and more recently has aided the American Law Institute in the simplification, clarification and codification of American law. It saw the need of reform in the administration of the law and has led the movement for the establishment of state judicial councils throughout the Union. It has promoted pretrial procedures. It helped to draft and promote the enactment of the Administrative Procedure Act. It has insisted that the courts themselves are best qualified to formulate the rules of court procedure, and points with pride to the Acts of Congress authorizing the Supreme Court of the United States to prescribe unified rules of practice in causes at law and in equity in the federal courts. It successfully opposed the "court-packing" effort. It has concerned itself with the sound development of international law. The Association has stimulated a healthy interest in the improvement of methods for the selection of judges; has maintained that ours is a profession and not a trade, and has opposed the encroachment of lay individuals and corporations, which in this commercial age are attempting to reduce the standards and conceptions of personal responsibility in the profession to the plane of ordinary business in the market place. It has worked constantly for co-operation between the press and the Bar, and for a more wholesome public interpretation of our legal institutions and the administration of justice. It has encouraged the formation and strengthening of state and local bar associations, which now number approximately fifteen hundred. Recognizing the injustice of the public's holding the Bar responsible for abuses and at the same time not giving the Bar authority to correct them, The Association conceived, and in many states has successfully promoted, the incorporation of state Bars, with authority as instruments of government, to prescribe and enforce professional standards and formulate and carry out a program in keeping with the highest ideals of the profession. At no time or place in history have there been so many agencies so earnestly or unselfishly engaged in the enterprise of improving the law and its administration as at the present time in the United States. We may congratulate ourselves on what has been undertaken under the aegis of the American Bar Association to date.

E. Smythe Gambrell, Chairman, Committee on Regional Meetings, and former Chairman of the Conference of Bar Association Delegates.

Its great objective has been the taking of more than 225,000 individualistic lawyers of this country and converting them into a legal profession in the true sense of the term—an all-inclusive group that is possessed of an ideal and a code of ethics—that is informed, that has a well-reasoned opinion and a voice to express it, and the authority that derives from the dedication of these to the common good. In 1936 at the Boston Meeting, the American Bar Association brought to happy consummation the movement for a representative national bar organization in which many great leaders had a part. There we sounded the note of co-operation, not simply as lawyers, but as associations of lawyers. The American Bar Association now endeavors to speak as the accredited voice of the united Bar of America.

But it would be a mistake to re-

gard the 1936 achievement as the perfection of bar organization in this country. In the words of Shakespeare, "What's past is prologue."

Our leaders must face the fact that of approximately 225,000 lawyers in active practice in America at this time, only 51,000, or 23 per cent, are members of this Association. There was an average attendance of only 3,659, or less than 1.62 per cent of all lawyers, at the Annual Meetings during the past five years, and fewer than 1,000, less than one half of 1 per cent of all lawyers, have attended as many as two Annual Meetings in the past five years.

It has become quite evident that Annual Meetings are not adequate forums for the 225,000 lawyers in America or for even the 51,000 who are members of this Association. Relatively few lawyers have first-hand knowledge of the American Bar Association and its growing program of activities.

The framers of our current Constitution and By-Laws recognized this problem and wisely provided for Regional Meetings which could be held in areas outside the immediate range of the Annual Meetings.

The recent reactivation of Regional Meetings is producing a bright new chapter in the history of the organized Bar of this country. Starting with Atlanta in March, 1951, all Regional Meetings have been highly successful, the registered attendance (not counting the ladies) having been as follows: Atlanta, in 1951, 620; Dallas, in 1951, 1189; Louisville, in 1952, 952; Yellowstone Park, in 1952, 340; Omaha, in 1953, 980; Richmond, in 1953, 1176; Atlanta in 1954, 1562, and now Portland, 1059.

Regional Meetings Are Attracting Lawyers

These meetings are bringing the American Bar Association and its great program of continuing legal education, inspiration and good fellowship to the rank and file of lawyers throughout the country. Thousands who heretofore have been non-members, or inactive members, of the Association are being attracted to it, for the first time are enlisting in its fine civic enterprises, and, in turn, are profiting from the manifold advantages which the Association has to offer.

The constructive possibilities of Regional Meetings in our National Bar Program are unlimited. Much which has been assigned to the Annual Meetings in the past may well be transferred to the functions of Regional Meetings.

The Association's Committee on Regional Meetings is now engaged in making advance plans for Regional Meetings to be held after the current year. Questions as to how many Regional Meetings should be held in any one year, as to situses for meetings, as to stability or flexibility of regional boundaries and host cities, and as to pattern, scope and content of Regional Meeting programs are still under consideration, and experience is teaching us gradually how to proceed in order to accomplish most.

These Regional Meetings are our only hope for making this Association truly representative of the legal profession in this country.

We should organize not only the ablest lawyers, but also those at the bottom who, in many instances, have failed to affiliate with any bar organization because they are unwilling to accept organization standards and obligations. Every lawyer who is worthy to practice law—to hold his professional license—ought to be a member of the organized Bar. Our profession cannot honorably take the position that the unsuspecting public shall be permitted or encouraged to commit its law business to licensed lawyers with whom other lawyers cannot afford to be associated. To say that a lawyer is unworthy of membership in a bar association ought to imply that he is unworthy to hold his license or enjoy the trust and confidence of clients.

And, in our national mobilization of the profession, let us not overlook the importance of maintaining in full vigor our state and local associations which are rooted in local sentiment, and to some of which are attached the most precious traditions of service and fellowship. We cannot accomplish what we seek without the strengthening influence of intimate personal relationship. We need the intensive work of local groups, and we need the co-operation of all associations to speak with the authority of the entire Bar. The national body will hardly be more robust than the State and local bar associations whose chosen representatives it brings together.

But improving substantive and adjective law and the Bar and bar organization is not enough. To attain that goal of social good order, which is the real objective, we must strive for a technique whereby the promulgated rule may function effectively as a social force. Even the most perfect laws are not self-executing. The reforms they embody will be meaningless without this technique. Too frequently in times past we of the profession have assumed that we could discharge our duties of leadership by the perfection of legal doctrine. Good administration is largely a matter of skill and spirit, rather than of the number and complexity of the rules which are provided. While the legal profession, by reason of its training, experience and exclusive license, is specially charged with the duty of leadership in maintaining, improving and administering a system of justice, it may be said that all our institutions spring from the people, and that the people, in the long run, will have the kind of justice they deserve. In the triangle of the administration of justice, the Bench and the Bar have peculiar responsibilities, but the base of the triangle is the public. All three have obligations, and all should observe codes of ethics.

Since law improvement cannot rise above popular respect for law and the agencies that enforce it, it is of paramount importance that our legal institutions and their functioning should be fairly and intelligently interpreted to the people. We cannot hope to secure popular respect

for the law or its administration when the rights of litigants frequently are determined by sensational newspaper trials in advance of or during trials by constituted authority. Until the public sees in the trial of a case something more than a display of forensic skill and recognizes that it has an interest in right prevailing in every instance, the struggle for a better administration of justice will be discouraging. Our profession may well urge upon the profession of journalism, as a matter of enlightened self-interest as well as of public duty, the importance of fair and accurate reporting of the functioning of our legal institutions, for in such reporting freedom of the press has its only safeguard. If democracy is to be a real and living thing, the citizens who share the responsibility of governing—all citizens—ought to have access to information upon public affairs which is accurate and adequate.

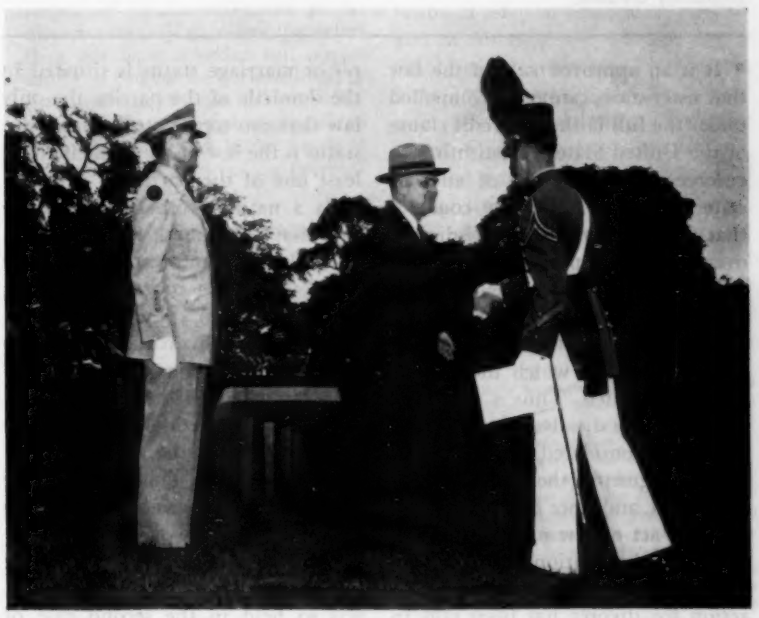
I verily believe we are at the beginning of a new day for the legal profession in this country. Let us rededicate ourselves to service in keeping with its best traditions. Our first charge, our abiding obligation, concerns the promotion of justice, and our greatest happiness should be found in the fellowship and co-operation of those engaged in the task of safeguarding and improving it. The force which binds us as members of separate Bars of distant states is our common devotion to a great cause. Here amidst the natural grandeurs of this scenic wonderland, and in the glow of mutual encouragement, we are enabled to recapture the enthusiasm of our high calling and to rekindle the ideals which must continue to guide us in the performance of our duty.

Award to West Point Cadet

▪ At a retreat review at West Point on June 6, 1954, the American Bar Association award to the cadet ranking first in law at the United States Military Academy was presented to Cadet William L. Allan of New York City.

Brigadier General Ralph G. Boyd, JAGC, USAR, of Boston, Massachusetts, made the presentation for the Association this year. The award, presented annually since 1941, consisted of two two-volume sets of books: Albert F. Beveridge's *Life of Marshall* and Merle J. Pusey's *Charles Evans Hughes.*

Cadet Allan was born in New York City on January 19, 1929. He came to West Point in 1950 under a regular army appointment after two years enlisted service. Cadet Allan held the cadet ranks of corporal and sergeant in the Corps of Cadets and participated in the following cadet activities: President of the Mathematics Forum, President of the Rifle Club, Howitzer Staff, Pistol Club, Spanish Club, Varsity Rifle Squad. Out of a class of 638 members, he graduated number 11 on June 8, 1954, and was commissioned a second lieutenant, choosing the artillery as his branch of service. Present orders assign him to Fort Bliss, Texas; the Airborne School at Fort Benning, Georgia; and the Anti-Aircraft Artillery Command at Los Angeles, California.



On June 10, 1954, at the Cadet Chapel, the new lieutenant married Miss Joan C. Burdekin of New York.

Migratory Divorce:

The *Sherrer* Case and the Future—A Prophecy

by Harry B. Swanson • of the Nevada Bar (Reno)

■ The 1948 Supreme Court decision in *Sherrer* v. *Sherrer* involved a migratory divorce obtained by a wife in Florida. The Court refused to allow a collateral attack by the husband on the ground that the Florida finding that the wife had a *bona fide* Florida residence was entitled to full faith and credit. The decision has not been popular in all circles, since many feel strongly that states with strict divorce laws should not be forced to succumb to the few states that thrive on liberal divorce laws. Mr. Swanson examines the whole problem of migratory divorce.

■ It is an approved rule of the law that sister states cannot be compelled under the full faith and credit clause of the United States Constitution to enforce divorce decrees of another state unless the respective court of that state entertained jurisdiction over the subject matter by virtue of being the domicile of at least one of the parties.[1] This statement is premised on the concept that marriage is a relationship in which the state is vitally interested. Thus a decree of divorce which dissolves the marriage cannot be considered as a mere personal judgment; the state, too, is concerned, and since this is the situation, an act of law must operate to terminate the relationship. But what is the law that is to so operate? An action for divorce has been said to be or to have the characteristics of an *in rem* proceeding,[2] the subject matter or *res* of the divorce proceeding being the marriage status. It follows that since a suit for divorce is in the nature of an action *in rem*, and the *res* or marriage status is situated in the domicile of the parties, the only law that can terminate the marriage status is the law of the domicile of at least one of the parties.

As a natural consequence of the rule that a judgment is not entitled to obligatory enforcement by any court unless the court rendering it had jurisdiction, plus the concept that a suit for divorce is a type of *in rem* proceeding, the courts have held that domicile is an essential requirement for jurisdiction in the matter of divorce. Thus the migrant plaintiff, not actually domiciled in the state where he obtained his ex parte divorce, might discover that the decree was void since the court lacked jurisdiction to grant the decree. It was so held in the second case of *Williams* v. *North Carolina*.[3]

However, in 1948 the value of the rule in the second *Williams* case was lessened considerably by the Supreme Court's disregard for the traditional requisite of domicile. This was accomplished in the sister cases of *Sherrer* v. *Sherrer*[4] and *Coe* v. *Coe*.[5] In *Sherrer* v. *Sherrer* the wife went from Massachusetts to Florida, suing for divorce on completion of the ninety-day statutory period of residence in Florida. The husband followed his wife to Florida and appeared both in person and through counsel in the divorce proceeding; all allegations of the wife's complaint, including her claim to Florida residence, were denied by the husband. However, when the wife attempted to prove her Florida residence, the husband made no endeavor to question the evidence. The Florida court, finding that the wife had acquired a bona fide Florida residence, granted the divorce. No appeal was sought by the husband. Shortly thereafter, the wife remarried and returned to Massachusetts; her first husband, the defendant in the Florida suit, then attempted to collaterally attack the Florida decree in the Massachusetts court. The Massachusetts court allowed the at-

1. *Williams* v. *North Carolina*, 317 U. S. 287, 63 S. Ct. 207, 87 L. ed. 279 (1942).

2. *Restatement, Conflict of Laws* 110 (1934); *Restatement, Judgments* 74 (1942); *Williams* v. *North Carolina*, 325 U.S. 226, 229, 65 S. Ct. 1092, 89 L. ed. 1577 (1945).

3. *Williams* v. *North Carolina*, 325 U. S. 226, 65 S. Ct. 1092, 89 L. ed 1577 (1945).

4. 334 U. S. 343, 68 S. Ct. 1087, 92 L. ed. 1429 (1948).

5. 334 U. S. 378, 68 S. Ct. 1094, 92 L. ed. 1451 (1948).

tack, saying because the wife was never domiciled in Florida, that the Florida court lacked the necessary jurisdiction and that the resulting decree was void. On appeal to the Supreme Court of the United States, the Massachusetts judgment was reversed on the ground that it denied to the Florida decree the protection of the full faith and credit clause of the Constitution.

The fundamental concept upon which the decision of the Supreme Court in the *Sherrer* and *Coe* cases is predicated can be found in *Davis* v. *Davis*.[6] In the *Davis* case, the Virginia court held that the husband was domiciled within the state and granted an absolute divorce, this over the objections of the wife, who had appeared in the Virginia divorce proceeding for no other reason than to contest the jurisdiction of the court on the basis of lack of domicile of both of the parties. The wife thereafter attacked the Virginia decree in the courts of the District of Columbia; those courts allowed the attack, refusing to recognize the jurisdiction of the Virginia court. But, on appeal to the Supreme Court of the United States, it was held that there could be no collateral attack by the wife since she had appeared in the Virginia proceedings and fully litigated the issue of the husband's domicile. The courts of the District of Columbia, then, had denied full faith and credit to the Virginia decree.

The majority of the Court in the *Sherrer* and *Coe* cases relied heavily on the *Davis* case in handing down their controversial decision. Mr. Chief Justice Vinson, for the Court, stated:

> . . . It is clear that respondent was afforded his day in court with respect to every issue involved in the litigation, including the jurisdictional issue of petitioner's domicile. Under such circumstances, there is nothing in the concept of due process which demands that a defendant be afforded a second opportunity to litigate the existence of jurisdictional facts. . . .[7]

However, it would appear that the *Sherrer* and *Coe* cases have considerably enlarged the doctrine laid down in the *Davis* case. The new concept in *Sherrer* v. *Sherrer* is satisfied by a mere appearance along with general participation in the divorce suit on the part of the defendant. The domicile of the plaintiff, of course, may be admitted[8] by the defendant, but the circumstance that the defendant does not contest the jurisdictional question as to domicile either in his pleadings or on the hearing is immaterial. Consequently, as the law is today, the plaintiff in a *Sherrer* v. *Sherrer* situation is entitled to extraterritorial protection from the defendant's collateral attack which contests the plaintiff's domicile in the forum rendering the decree regardless of whether the defendant actively litigates the question of domicile or merely admits it. The doctrine of the *Sherrer* case may now be stated in these terms:

> . . . the requirements of full faith and credit bar a defendant from collaterally attacking a divorce decree on jurisdictional grounds in the court of a sister state where there has been *participation*[9] by the defendant in the divorce proceedings, where the defendant has been accorded full opportunity to contest the jurisdictional issues [whether he does or not],[10] and where the decree is not susceptible to such collateral attack in the courts of the state which rendered the decree.[11]

Sherrer Opponents Wish To Narrow Scope of "Participation"

There are some writers, authorities, and courts, who opposing the rule formulated in the *Sherrer* and *Coe* decisions, wish to narrowly confine this concept of participation[12] which so effectively precludes the defendant from collaterally attacking the foreign divorce decree.

Despite the express wording of *Sherrer* v. *Sherrer* and *Coe* v. *Coe*, New Jersey, Oklahoma[13] and Wisconsin[14] have attempted to distinguish the decisions, an attempt which is admirable, but probably futile. The New Jersey Supreme Court, in *Staedler* v. *Staedler*,[15] has endeavored to limit the application of the *Sherrer* case to:

> . . . a true adversary proceeding where the parties are represented by counsel of their independent choice and where there is opportunity to make voluntary decision on the question as to whether or not the case should be fully litigated either on the question of jurisdiction or the merits. . . .[16]

This distinction is predicated on the fact that in the *Sherrer* and *Coe* cases both parties to the litigation had actually chosen their own counsel and were present in the courtroom. In *Staedler* v. *Staedler* the defendant wife agreed to the appearance, the husband selected her counsel for her and at no time was she present in the Florida courtroom. Herein, the New Jersey court found its distinction: Since the defendant had neglected to choose her own counsel, she had not sufficiently participated in the litigation of the case. Therefore, she was not bound by the *Sherrer* doctrine and could later collaterally attack the Florida decree in the New Jersey courts.[17]

The trend which the Supreme

6. 305 U. S. 32, 59 S. Ct. 3, 83 L. ed. 26 (1938); see also, note 1 A.L.R. 2d 1385 (1948).

7. 334 U. S. 343, 348.

8. In Coe v. Coe, 334 U. S. 378, 68 S. Ct. 1094, 92 L. ed. 1451 (1948), the defendant admitted the plaintiff's domicile, refusing even to contest that particular phase of the case. When he attempted later to contest the decree of the Nevada court, he was held barred by the doctrine of *res judicata*.

9. Italics added.

10. The writer adds this phrase. This is reasonable in view of the decisions. See note 8, *supra*.

11. 334 U. S. 343, 351-352.

12. See note 11, *supra*.

13. In *Brasier* v. *Brasier*, 200 Okla. 689, 200 P. 2d 427 (1948), the defendant wife signed an entry of appearance; however, no pleadings were filed by the wife, nor was representation of counsel secured. The Oklahoma court refused to give conclusive effect to the Arkansas divorce obtained under such circumstances.

14. The Oklahoma decision, note (13), *supra*, was substantially followed by the Wisconsin court in *Davis* v. *Davis*, 259 Wis. 1, 47 N.W. 2d 338 (1951), wherein the defendant wife merely entered a formal appearance before the court of the sister state which granted the divorce.

15. 78 A. 2d 896, 6 N. J. 380 (1951). The wife signed an agreement providing for her financial support; the agreement further provided that she would enter any appearance required in the divorce proceeding to be instituted by her husband. The husband journeyed to Florida, engaging an attorney to represent his wife in the divorce proceedings. She executed the appropriate papers to enter an appearance in the Florida hearing; the divorce was granted. Later when the husband failed to make payments to the wife under the original agreement, she sought a New Jersey divorce with alimony. The New Jersey court refused to give conclusive effect to the Florida divorce, granting the requested divorce with alimony.

16. *Id.* at 902.

17. *Id.* at 896.

Court of the United States has been following, however, refutes this distinction. It may well be argued that the statement of Mr. Justice Reed in the recent case of *Johnson* v. *Muelberger*,[18] though it is only dictum, sheds light on the question of participation, and may minimize any necessity for active choice of counsel and personal appearance in the courtroom by the defendant party. In his critique of the holding in the *Sherrer* and *Coe* decisions, Mr. Justice Reed remarked:

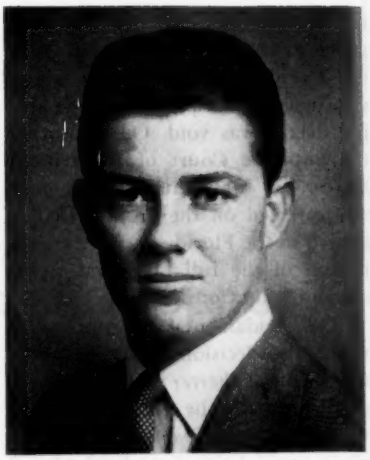
> It is clear from the foregoing that under our decisions a state by virtue of the clause must give full faith and credit to an out-of-state divorce by barring either party to that divorce who has been personally served or who *has entered personal appearance*[19] from collaterally attacking the decree.[20]

In view of this statement, and on appraisal of the recent trend in the Supreme Court, it is a reasonable assertion that the New Jersey distinction of *Sherrer* v. *Sherrer* will not be sanctioned by the Supreme Court of the United States.

In this respect, the courts of California have taken a more realistic attitude toward the *Sherrer* and *Coe* decisions. Several recent California cases have followed the *Sherrer* doctrine, stating in effect that actual litigation of the question of domicile is not an essential, mere participation in the divorce proceeding with opportunity to litigate being completely adequate. In the cases of *Knox* v. *Knox*[21] and *Estate of Schomaker*[22] it was held that an answer filed by a Nevada attorney acting under power of attorney given by the wife was sufficient participation, any future collateral attack on the resulting divorce decree thus being barred by the doctrine of *res judicata*. In *Estate of Schomaker*, the defendant wife in California signed a power of attorney authorizing an appearance for her by Nevada counsel in the Nevada Court in which the plaintiff husband was prosecuting his suit for divorce. The particular power of attorney was that customarily used by Nevada attorneys and was in blank at the time the defendant signed it. In fact, the defendant expressed no preference for any individual Nevada attorney; thus there was no independent choice of counsel, and the attorney who ultimately represented her was chosen by the plaintiff in the Nevada action. In holding that the defendant wife in the Nevada proceeding could not collaterally attack the foreign divorce decree in the courts of California, the California court stated:

> . . . It is sufficient if the defendant has participated in the proceedings and had full opportunity to litigate the issue. If so, the decree is binding even though a relitigation of the question of jurisdictional residence requirements in another state might result in a finding that the domiciliary claim was fraudulently asserted for the purpose of obtaining a decree which as a matter of policy could not be procured in the state of actual domicile. Therefore, where, as here, the finding of requisite jurisdictional facts was made in divorce proceedings in another state in which the defendant appeared and *participated*,[23] the decree has become final, it must be given full faith and credit in the courts of this state.[24]

From the foregoing discussion, it is obvious that the definition and ultimate limitation of the concept of participation are matters of conjecture to be left to the Supreme Court of the United States. The term "participation" is used only generally and is rarely defined. Those who analyze the cases can only answer the question of what is participation in an indefinite, and certainly inadequate manner. On close analysis, it would seem that the California interpretation is the better view; it is undoubtedly the more liberal, and the Supreme Court of the United States appears to be following the liberal, rather than the conservative, trend. Therefore, it is reasonable to conclude that if and when the Supreme Court is called upon to define the term, it will follow California's lead and reply that mere voluntary appearance through counsel on the part of the defendant in the courts of the forum is sufficient to deny to the defendant any right to collaterally attack the resulting decree in the courts of a sister state.



Harry B. Swanson, honor graduate of Hastings College of Law, University of California, is a member of the Bar of Nevada. His experience includes service as Assistant City Attorney in Reno, Nevada, and as a legal officer in the United States Air Force. He is the author of articles published in the *Hastings Law Journal* and the *Nevada State Bar Journal*.

Policy For and Against the Sherrer Case

The very fact that New Jersey, Oklahoma and Wisconsin have endeavored so strongly to distinguish *Sherrer* v. *Sherrer* demonstrates that the case is not viewed with favor by many factions. On the other hand, the *Sherrer* case has its just share of proponents. To those who closely appraise the case, it seems to be either good or bad, with no in-betweens—an over-all dichotomous effect.

The basic argument of those who oppose the *Sherrer* and *Coe* cases may be defined: those states that maintain strict divorce laws and policies should not be forced to succumb to the few states which thrive on liberal migratory divorce laws. The voice of

18. 340 U. S. 581, 71 S. Ct. 474, 95 L. ed. 552 (1951).
19. Italics added.
20. 340 U. S. 581, 587.
21. 88 Cal. App. 2d 666, 199 P. 2d 766 (1948).
22. 93 Cal. App. 2d 616, 209 P. 2d 669 (1949).
23. Italics added.
24. 93 Cal. App. 2d 616, 623, 209 P. 2d 669, 673 (1949).

religious authorities is quick to support this stand and is raised constantly in opposition to more liberal divorce laws. And political forces[25] normally ally themselves closely with the religious forces, reasoning that the state of true domicile has a basic concern in the marriage status, a concern in which it should not be deprived. Furthermore, it cannot be denied that there is a mercenary undercurrent which, however outwardly clothed with honesty, is premised on the basic proposition that the "divorce business" is quite lucrative and should not be lost to Nevada and its internationally famous Reno, which supply a ready haven for the divorcé.

Looking at the argument from the other side, even the most ardent opponents of obligatory recognition of foreign divorce decrees will readily acknowledge the need for a rule of uniform recognition of all divorces valid in the forum where rendered. It is neither good sense, good morals nor good law to continue the incongruous and highly inappropriate situation in which a divorce is legal in one state and illegal in another, so that a divorcé who has remarried may become a felon by merely stepping across a state line. In like manner, the children of the new marriage may be legitimate in one state and illegitimate in another. These arguments, of course, favor the continuance of the doctrine laid in *Sherrer* v. *Sherrer*.

Further substantiating this line of reasoning, such states as Florida and Nevada have their own concept of domicile and regard it as established and bona fide when the statutory residence requirement is satisfied. The divorce proceeding may be instituted after the plaintiff has completed this residence requirement. In contradistinction, other states refuse to be contained by their sister states' position in the matter, rather questioning the foreign divorce decree on jurisdictional grounds when their definition of domicile is not met. Thus it can be argued in favor of the recognition of migratory divorces that Florida and Nevada do, after all, have their own individual and unique policies concerning divorce and domicile; other states of the Union have no constitutional right to deny this policy.

Mr. Justice Rutledge recognized this argument in his dissent in the second *Williams* case, where he remarked that Nevada and North Carolina had their own distinct statutory laws and policies concerning the matter of divorce. Therefore, when North Carolina sought to upset the Nevada decree, it was, in effect, denying Nevada law and policy, and thus denying full faith and credit to the Nevada decree.[26]

Much the same argument was employed by Mr. Chief Justice Vinson in the majority opinion in *Sherrer* v. *Sherrer*, when he said:

> . . . This is a . . . case involving inconsistent assertions of power by courts of two states of the Federal union and thus presents considerations which go beyond the interest of local policy, however vital. In resolving the issues here presented, we do not conceive it to be a part of our function to weigh the relative merits of the policies of Florida and Massachusetts with respect to divorce and related matters.[27]
>
> It is one thing to recognize as permissible the judicial re-examination of findings of jurisdictional fact where such findings have been made by a court of a sister state, which has entered a divorce decree in an *ex parte* proceeding [Williams v. North Carolina No. 2]. It is quite another thing to hold that the vital rights and interests involved in divorce litigation may be held in suspense pending the scrutiny by Courts of sister states of findings of jurisdictional facts made by a competent court in proceedings conducted in a manner consistent with the highest requirements of due process and in which the defendant has participated.[28]

There is always the very liberal view in support of the *Sherrer* decision, and in derogation of the second *Williams* case that American life and morals are undergoing an evolutionary change, that though it may be contrary to local public policy, it is national public policy that our interstate divorce law should be inoculated with certainty, a certainty much greater than that guaranteed by the *Sherrer* case. Those who defend such a view would reason that it is an elementary proposition that a man or woman should not be a monogamist in one state and a bigamist, and felon, in another.

Despite the exertion of pressure for a more strict judicial interpretation and limitation of migratory divorce, the trend seems to be progressing in just the opposite direction, for the doctrine of *Sherrer* v. *Sherrer* has been extended.[29] Family disorganization has become so very complex in this modern day that it is virtually impossible to solve the problems that are prone to arise by application of strict divorce laws. Divorce decrees granted under laws which are becoming increasingly liberal should be accorded a greater stability; this would seem an appropriate response to the changing role and function of the American family, a view apparently shared by the Supreme Court of the United States. It cannot be disputed that our society is changing in favor of more liberal divorce laws. Divorce has come to be almost commonplace; one scarcely loses an iota of his good standing in society merely because he has been divorced. This fact hardly commends the strict divorce laws and nonrecognition of migratory divorces which some authorities so strongly endorse. It may be that education will ultimately be the answer to the deplorable divorce situation.

The Restrictive Scope of *Sherrer* v. *Sherrer*

In 1948, Mr. Chief Justice Vinson in *Sherrer* v. *Sherrer*, speaking for the majority, showed a clear disposition

(Continued on page 726)

25. The Uniform Divorce Recognition Act, a product of the commissioners on Uniform State Laws and approved by the legislatures of a number of states (California, Nebraska, New Hampshire, Rhode Island, South Carolina, Washington and Wisconsin) has as its underlying object the destruction of the great majority of migratory divorces. For a discussion of the act, see "Work of the 1949 California Legislature", 23 So. *Calif. L. Rev.* 7 (1949); as to the constitutionality of the act, see Ruymann, "The Problem of Migratory Divorce: The Utility or Futility of Legislation", 5 *Law & Law N.* 10, 14-15 (Win. 1951-52).

26. 325 U. S. 244, 250.

27. 334 U. S. 343, 354.

28. *Id.* at 355-356.

29. *Johnson* v. *Muelberger*, 340 U. S. 581, 71 S. Ct. 474, 95 L. ed. 552 (1951).

Life Insurance Investments:

Some Legal Phases

by **Churchill Rodgers** · General Counsel of Metropolitan Life Insurance Company

■ **This is the first of two installments of Mr. Rodgers' paper on the subject of life insurance investments, based on his experience with the Metropolitan Life Insurance Company and presented at the University of Chicago Law School Conference on Insurance on January 15, 1954. This month's installment deals with recent legal developments in connection with life insurance company investments. In a subsequent issue, investments in corporate securities will be discussed.**

■ The fields of investment in which New York life insurance companies are concerned, subject to the requirements and limitations of applicable statutes, are housing and other income-producing real property, government and corporate securities and city and farm mortgages.[1] Substantial compliance with the investment requirements and limitations of the New York statute by foreign insurers doing business in New York may be required as a condition to the issuance or renewal of their licenses to do business in New York.[2]

Because of the limitations of time, space and interest, my mission here is limited to a discussion of some illustrative recent legal developments and incident problems arising in three of the fields mentioned: housing, other income-producing real property and corporate securities. Necessarily, my discussion must be based on my experience in these fields with Metropolitan Life Insurance Company. Those of you who represent or hope to represent domestic or foreign insurers doing business in the State of New York or corporations financed or seeking financing by such insurers may be particularly interested.

1. HOUSING

Exclusive of an early experimental project of about 2,100 apartments recently sold as having accomplished its purpose, Metropolitan Life Insurance Company has constructed and is operating seven housing projects containing over 34,000 apartments and incident shopping and other business facilities and providing homes for more than 100,000 people. The underlying concept has been to create in each case a whole new community on such a scale as to be relatively independent of adjacent communities, and hence not subject to neighborhood depreciation, and made attractive and protected from obsolescence by well-designed, fireproof construction, with generous provision for light and air in a setting of green lawns, trees, flower beds, garden paths, and playgrounds. Parkchester, Stuyvesant Town, Peter Cooper Village, and Riverton are located in New York; Parkfairfax in Alexandria, Virginia; Parkmerced in San Francisco; and Parklabrea in Los Angeles. Stuyvesant Town and Riverton were built under the New York Redevelopment Companies Law and the other projects under Section 84 of the New York Insurance Law. In conception, execution and management they are the work of F. H. Ecker, Metropolitan's former chairman, now honorary chairman, of the board of directors.

The first purpose of a life insurance company in investing the funds entrusted to it by its policyholders must be safety of principal, with the maximum yield consistent with such safety. There is a second purpose of parallel importance—that is, so to invest as to accomplish a maximum of public good. Thus in the construction of its various housing projects Metropolitan not only has had in mind the financially sound investment of its funds but has attempted to do its share in overcoming the housing shortage in such a way that moderate income families may live in urban communities in a suburban atmosphere. Certainly this is a prime example of private enterprise productively devoted to

1. N.Y. Insurance Law Article 5.
2. N.Y. Insurance Law §90.

public service. In effecting that purpose, however, many legal problems have been encountered, at least some of which may be attributed to the fact that there are those who have sought to make this realm of endeavor an area of social and political conflict.

Tenants' right to privacy.—A case in which Metropolitan became involved as a result of its desire to protect the privacy of its tenants raised fundamental constitutional questions.[3] You are undoubtedly familiar with the sect known as Jehovah's Witnesses. They are not noted for their retiring personalities. They are insistent salesmen of their literature. Tenants at Parkchester objected to their visits. Representatives of the Watchtower Society, the parent society of Jehovah's Witnesses, insisted on the right of the Witnesses to make such visits under the constitutional provisions guaranteeing freedom of speech and religion. They were permitted to visit those who desired their visitations. The management undertook to protect the tenants from undesired visits by enforcing a regulation adopted by management pursuant to an enabling provision contained in the leases.

Finally, counsel for the Witnesses served Metropolitan with an action for an injunction and declaratory judgment. Metropolitan went to the trouble and expense of asking its tenants their wishes in the matter. Over 11,000 of the Parkchester tenants indicated that they did not desire the visits and some twenty-eight indicated willingness to have the visits. The twenty-eight names were furnished to the Witnesses and they were forbidden access to the remainder of the tenants. While the trial was in process, over seven hundred Witnesses stormed Parkchester one Sunday morning and succeeded in waking up all the tenants.

In other cases it had been decided that the Witnesses could not be excluded from privately owned streets which were open to the public.[4] It had been held that by municipal ordinance they could not be prevented from knocking on the door of a householder who had not invited them.[5] Their position in this case was that the hallways of an apartment house were not different from a private street or the approach to a private house. The courts refused to accept their contentions and the rights of privacy and property involved were protected. The line was drawn between an appropriate place (streets) and an inappropriate place (hallways) for the exercise of freedom of speech and religion, and the right of the possessory owner to exclude strangers was upheld. When certiorari to the Supreme Court of the United States was denied, the winning of cases before the Supreme Court by Jehovah's Witnesses was interrupted. It is believed that in that case Metropolitan was able to render a service to landlords and tenants generally in the interest of quiet, privacy and good management.

Constitutionality of the redevelopment companies law.—Stuyvesant Town has been the project most productive of litigation. A partial reason for this may be that it was a pioneering co-operative effort of private enterprise and state and municipal governments to aid in the cure of urban blight. It seems to be the fatal tendency of our urban communities to grow at the edges while rotting at the center. Land in area large enough to develop and at prices permitting economic and attractive development may be more easily acquired in suburban areas than in urban areas. Diverse ownership in small parcels and inflated land values effectively prevent rehabilitation by private enterprise without inducements which can be afforded only by government. Without such inducements, blight spreads, crime and disease-ridden slums increase in area, tax delinquencies mount, the cost of rendering necessary municipal services increases, and city credit declines. The Redevelopment Companies Law, under which Stuyvesant Town was built, sought to afford to private enterprise the aid of condemnation in accumulating the necessary area and partial tax exemption to permit fair earnings at limited rentals—and, most important, if the co-operation of private enterprise was to be gained—without impairing the private status of private enterprise.

Under the provisions of that law a detailed contract was worked out with the City of New York for the rehabilitation of eighteen city blocks constituting the notorious gashouse district. The total expense of acquisition, clearance and construction was to be paid by Metropolitan, and not one penny was to be contributed by the city. Assembly of land was to be aided by condemnation, and the completed project was to pay taxes for a period of twenty-five years based on the assessed value on the tax rolls of all land and improvements within the project area at the time of acquisition, including property such as schools and churches previously exempt. Interior public streets were to be closed and the land conveyed in exchange for exterior strips to be used to widen the exterior public streets and to be paved at the expense of Metropolitan. The only concession made by the city in order to induce the construction of the project was to give up something it did not have and would not have unless the project were built—the right to tax for twenty-five years that part of the value of the completed project representing an increase in value over the assessed valuation of the land and buildings acquired for the project. At the end of the period the project was to become fully taxable, and in the meantime the city would benefit by the increase in the assessable values of the surrounding properties.

Average maximum rentals were set with the proviso that, if they did not provide a yield before depreciation of 6 per cent on the total actual final cost of the project, the Board of Estimate of the city would upon

3. *Watchtower Bible and Tract Society v. Metropolitan Life Insurance Co.*, 297 N.Y. 339, 79 N.E. 2d 443, *cert. denied*, 335 U.S. 886 (1948).
4. *Marsh v. Alabama*, 326 U.S. 501 (1946); *Tucker v. Texas*, 326 U.S. 517 (1946).
5. *Martin v. Struthers*, 319 U.S. 141 (1943).

submission of conclusive evidence to that effect approve an increase in such maximum rentals sufficient to provide such 6 per cent. It was further provided that at any time after five years the owner might terminate the contract by the payment of an amount equal to the past taxes from which it had been exempted plus interest at the rate of 5 per cent.

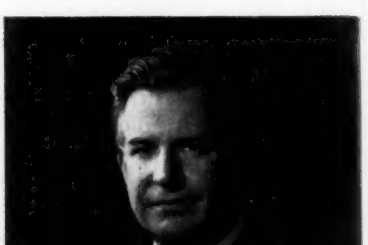
Opponents Attack Validity of Redevelopment Companies Law

Even before the contract was signed, opponents of the project brought an action in the name of property-owners, *Murray* v. *La Guardia*,[6] attacking the constitutionality of the Redevelopment Companies Law and the legality of the proposed contract. The fundamental constitutional objection was that, since the project would be constructed, owned, and managed by private enterprise for private profit, the proposed condemnation would not be for a public purpose. The courts held that the public purpose was rehabilitation and that that purpose would be accomplished upon the completion of the project. Objections to the legality of the contract as illusory and as not conforming with the statute were rejected without discussion, but the constitutional point was treated as substantial, and the decisions upholding constitutionality were by a divided vote of three to two in the Appellate Division[7] and of four to two, with one judge not participating, in the Court of Appeals. The *Murray* case has been generally followed in other jurisdictions.[8] There are apparently only two cases to the contrary—one in Florida[9] and the other in Georgia.[10]

Owner's right to select and retain tenants of its own choice.—A few months after the initiation of the *Murray* case, another suit in the nature of a taxpayer's action, *Pratt* v. *La Guardia*,[11] was brought. It raised many of the same questions raised in the *Murray* case but for the first time clearly presented the contention that the lack of provision for the admission of Negroes as tenants was a violation of the equal-protection-of-law provisions of the state and federal constitutions. The answer to that question would have required a determination of the private or public status of the completed project—or, more specifically, a determination of whether or not the management of the project and particularly the selection of tenants constituted state action. The court, after questioning the appropriateness of a taxpayer's suit to raise the constitutional question of denial of equal protection of the law, held the question to be premature and dismissed the complaint. Its decision was affirmed above without opinion.[12]

Question of Equal Protection Is Raised by Persons Rejected as Tenants

After renting began, this constitutional question was raised in two actions, one brought in the names of Negroes who claimed that they had been rejected as tenants because they were Negroes, and another brought in the name of a taxpayer.[13] The two cases were consolidated on appeal. The fundamental argument of the complainants was that the use of condemnation by the city to assemble the project area, the granting by the city of partial tax exemption, the regulation of earnings and rentals, the closing of interior streets and the widening of exterior streets and incident exchange of land, the imposition of restrictions on use and alienation, and requirements as to reporting to and visitation by the city operated to make the completed project public in nature, at least to such an extent that the acts of its management in selecting tenants amounted to state action within the meaning of the Fourteenth Amendment. Cases so treating the acts of political parties[14] and labor unions[15] were relied upon.



Churchill Rodgers began his legal practice in Honolulu after his graduation from Harvard Law School in 1926. Moving to New York City in 1928, he became attorney for Metropolitan in 1933. He has been general counsel since 1948.

The essential position of the defense was that the equal-protection clauses limited state action only, that the acts of private persons constituted state action only when they acted, as in the cases relied upon by the plaintiffs, in a capacity recognized by the state as governmental, that in selecting tenants the management was not acting in such a capacity, and that the factors relied upon by the plaintiffs as giving a public status to the project were really just elements in a bargain between private enterprise and government to accomplish the purposes of each and that no change of status was thereby intended or effected. This position of the defense was sustained by the lower court,[16] and

6. 291 N. Y. 320, 52 N. E. 2d 884 (1943) *cert. denied*, 321 U.S. 771 (1944).

7. *Murray* v. *La Guardia*, 266 App. Div. 912, 42 N.Y.S. 2d 612 (1st Dept. 1943).

8. *Herzinger* v. *Mayor of Baltimore*, 98 A. 2d 87 (Md. 1953); *Foeller* v. *Housing Authority of Portland*, 256 P. 2d 752 (Ore. 1953); *State* v. *Rich*, 159 Ohio St. 13, 110 N.E. 2d 778 1953; and cases therein cited.

9. *Adams* v. *Housing Authority of City of Daytona Beach*, 60 So. 2d 663 (Fla. 1953).

10. *Housing Authority of City of Atlanta* v. *Johnson*, 209 Ga. 560, 74 S.E. 2d 891 (1953).

11. 182 Misc. 462, 47 N.Y.S. 2d 359 (Sup. Ct. N.Y. Co. 1944), affd 268 App. Div. 973, 52 N.Y.S. 2d 569 (1st Dept 1945).

12. *Pratt* v. *La Guardia*, 294 N.Y. 842, 64 N.E. 2d 394 (1945).

13. *Dorsey* v. *Stuyvesant Town, Polier* v. *O'Dwyer*, 299 N.Y. 512, 87 N.E. 2d 541 (1949), *cert. denied*, 339 U.S. 981 (1950).

14. *E.g., Smith* v. *Allwright*, 321 U.S. 649 (1944).

15. *E.g., Steele* v. *L. & N.R. Co.*, 323 U.S. 192 (1944).

16. *Dorsey* v. *Stuyvesant Town, Polier* v. *O'Dwyer*, 190 Misc. 187, 74 N.Y.S. 2d 220 (Sup. Ct. N.Y. Co. 1947).

on appeal to the Appellate Division the decision was unanimously affirmed,[17] but on appeal to the Court of Appeals three of the seven judges dissented from that court's judgment of affirmance in the *Dorsey* case. In the *Polier* case, all concurred in dismissing the appeal. The Supreme Court denied certiorari, but there two justices thought that certiorari should be granted. The case established that the owners of a redevelopment project have the same freedom of choice in the selection and retention of tenants as do owners of other private property.

The complainants' case was financed by two social-minded organizations. Some seventeen other organizations with similar views appeared as *amici curiae*. Ten were represented by one attorney. With one or two exceptions, the nineteen organizations referred to accepted the *Dorsey* decision as finally determinative of the legal rights involved. However, at least one such group, by espousing the cause of a Negro family who became unauthorized occupants of an apartment as guests or subtenants in violation of clear lease provisions making such occupancy by anyone a lease violation, and by defending others whom the management sought to dispossess, demonstrated its unwillingness to abide by that decision.

The defendants in the dispossess actions[18] contended that they were being dispossessed because of their views and activities in opposition to the owner's policy in regard to the selection of tenants and that dispossess actions so motivated violated the equal-protection clauses. They contended further that the *Dorsey* case was distinguishable in that in the instant cases, unlike the *Dorsey* case, the owner had sought the aid of the courts and that consequently the cases at bar fell within the rule of *Shelley* v. *Kramer*,[19] holding the enforcement of legally "valid" restrictive convenants to be in contravention of the Fourteenth Amendment. The owner contended that the defendants were without legal right to continue in possession, that the owner's reasons for wishing to recover possession of its property were immaterial and need not be given, and that consequently the issuance of a dispossess order would not constitute state action in violation of the equal-protection clause. The position of the owner was sustained in all stages of the litigation, including, finally, denial in one of the cases of a stay by a Justice of the United States Supreme Court.[20]

Under like inspiration, a Negro family under pretense of legal subtenancy later took possession of a Parkchester apartment and resisted being dispossessed without the benefit of the arguments available in the Stuyvesant Town cases. After much public furor, including an incident of sympathizers chaining themselves to chairs at Metropolitan's home office, and the passage of nearly a year, they were physically evicted from the apartment by a marshal after refusing to vacate peacefully in obedience to a court order to vacate.[21]

In 1944 the Administrative Code of the City of New York was amended to prohibit discrimination in the selection of tenants for redevelopment projects thereafter contracted for,[22] and in 1950 the state legislature amended the Civil Rights Law to prohibit discrimination in any future housing having public assistance.[23] Provision for the prospective impact of both the local law and the amendment of the state Civil Rights Law recognized the probable constitutional inapplicability of such legislation to existing projects. Nevertheless, by local law[24] (the Brown-Isaacs bill) enacted in 1951, the administrative code of the city was again amended to purport to prohibit discrimination in the selection of tenants in existing redevelopment projects of which there was only one unaffected by existing legislation to the same effect, namely, Stuyvesant Town. This legislation was objectionable as special legislation, as retroactive in effect, as impairing existing contract and property rights, and as an invasion of a legislative field reserved to the state by Article XVIII of the state constitution, the Redevelopment Companies Law, the Public Housing Law, and the Civil Rights Law. However, prior to the enactment of the Brown-Isaacs bill but after the establishment in the Dorsey case of its right freely to select its tenants, Metropolitan had voluntarily followed the policy at Stuyvesant Town of not rejecting anyone as a tenant because of color. Certainly it can be definitely stated that since the enactment of the Brown-Isaacs bill no Negro has been denied tenancy at Stuyvesant Town because he was a Negro. Consequently there has been no occasion for establishing the invalidity of that law in the courts.

No Conflict Between "Property" and "Human" Rights

Here was no conflict, as some suggested, between a property right and a human right. The alleged human right to be selected as a tenant was a nonexistent right, and the property right to choose one's tenants, like all property rights, was in fact a human right. For Metropolitan, under attack, not to have defended its freedom of choice in the selection of tenants and thus to have

(Continued on page 722)

17. *Dorsey* v. *Stuyvesant Town*, *Polier* v. *O'Dwyer*, 274 App. Div. 992, 85 N.Y.S. 2d 313 (1st Dept 1948).

18. *Stuyvesant Town Corp.* v. *Berg et al.*, Mun. Ct., Borough of Manhattan, 4th Dist. (March 9, 1951) (not reported) affd. 126 N.Y.L.J. 1008 col. 4 (App. Div. Sup. Ct. 1st Dept October 26, 1951); *Metropolitan Life Insurance Company* v. *Davis et al.*, Mun. Ct., Borough of Manhattan, 4th Dist. (March 9, 1951) (not reported); see also *Davis* v. *Stuyvesant Town*, 125 N.Y.L.J. 553, col. 7 (Sup. Ct. N.Y. Co., February 14, 1951) (tenants' petition for injunction *pendente lite* denied).

19. 334 U.S. 1 (1948).

20. *Metropolitan Life Ins. Co.* v. *Berg*, see note 18 *supra*; accord, *Globerman* v. *Grand Central Gardens*, 115 N.Y.S. 2d 757 (Sup. Ct. Spec. Term N.Y. Co. 1952); see also *Novick* v. *Levitt & Sons*, 200 Misc. 694, 108 N.Y.S. 2d 615, affd, 279 App. Div. 617, 107 N.Y.S. 2d 1016 (2d Dept 1951).

21. Order of Mun. Ct. of City of N.Y., Borough of Bronx, 1st Dist., *Met. Life Ins. Co.* v. *Orlansky et al.* (L. & T. 5301-1952), *order affd*, 129 N.Y.L.J. 1030, column 2 (Sup. Ct. App. Term, March 27, 1953), *leave to appeal denied*, 129 N.Y.L.J. 1606, column 8 (App. Div. Sup. Ct. 1st Dept, May 13, 1953); for an interesting account of the proceedings see the *Daily Worker*, May 21, 1953, page 1.

22. Adm. Code of City of N.Y., § J 41-1.2 (L.L. 1944, No. 20).

23. N.Y. Civil Rights Law §§ 18-a through 18-e (L. 1950, c. 287).

24. Adm. Code of City of N.Y., § W41-1.0 (L.L. 1951, No. 41).

Prophecy, Realism and the Supreme Court:

The Development of Institutional Unity

by Paul J. Mishkin • Associate Professor of Law at the University of Pennsylvania Law School

■ **The number of dissenting opinions written by the members of the present Supreme Court has aroused expressions of concern from many members of the Bar. Professor Mishkin's article traces this phenomenon to the over-simplification of legal "realism" which became dominant during the depression. He theorizes that the Court's own "institutional awareness", of which the unanimous decision of the school segregation cases may be a symptom, is one of the most important factors in sustaining the Court's authority in the eyes of the public.**

■ Among the many noteworthy facets of the United States Supreme Court's recent decisions invalidating racial segregation in public schools, certainly the Court's unanimity ranks high.[1] One can surmise that the single voice was, at least to some extent, the product of institutional awareness among the Justices.[2] In this aspect, it is especially heartening. For it again demonstrates the existence of that basic reservoir of institutional pride which, as the segregation cases indicate, can be one of the Court's real strengths. But in this aspect it also raises by contrast the more abiding question why that institutional unity seems often to be more noticeable by its absence.

Constant unanimity on the Supreme Court is hardly to be expected. Nor does real institutional unity call for consistent accord. The very function of the Court as arbiter of our nation's most significant disputes would make any such aim both futile and undesirable. At the same time, however, lawyers who appreciate that fact have nevertheless long since expressed concern about the general run of the Court's operations. Professor Louis L. Jaffe, in introducing a survey of the 1950 Term, put it thus:

> The [Supreme] Court is yet to be appointed which will not be hotly criticized in some quarters. It is arguable that there has never been a "good court". If the present Court is not to escape this doom of all its predecessors, perhaps the most general criticism that might be directed against it is its relative lack of institutional awareness and pride. This manifests itself in a variety of ways. The number of concurrences and dissents, particularly to denials of certiorari, is far in excess of what appears to be needed to preserve essential and significant points of difference. As if to show that these differences are not the ineluctable promptings of intellectual integrity, the opinions ring with a personal tone of charge and countercharge, of points scored, of passion, predilection and horrid prophecy. One has so often the feeling that the vote of this or that justice is only remotely controlled by his apprehension of the legal issues and represents a judgment based on collateral considerations.[3]

With characteristic acumen, Professor Jaffe then went on to suggest as a possible cause that "to the appointing power it has been irrelevant that the incumbent justices may not respect the capacity of a new appointee".[4] He had already traced

1. *Brown* v. *Board of Education* and other cases, 22 U. S. L. Week 4245 (May 17, 1954); *Bolling* v. *Sharpe*, 22 U.S. L. Week 4249 (May 17, 1954).

As a sample of the press comment on the unanimity, see the "Review of the Week" section of *The New York Times*, May 23, 1954: "In many respects the decision was unusual. It was unanimous, and on important issues the Court frequently is split. . . ." (Page E1, column 7); "There was also praise . . . for the Justices' unanimity . . ." (Page E1, column 8). And see the next succeeding footnote.

2. The newspapers seemed to attribute the unanimity almost entirely to the influence of Chief Justice Warren. See, e.g., *The New York Times* cited in note 1 *supra* at page E1, column 8, and at page E5, columns 6, 7, 8. While one may certainly guess that he played a significant role, the newspaper writers seem to ignore some relevant data: decisions in past terms barring racial discrimination have also been unanimous, with a single opinion by then Chief Justice Vinson. See *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *McLaurin* v. *Regents of University of Oklahoma*, 339 U.S. 637 (1950); *cf. Shelley* v. *Kramer*, 334 U.S. 1 (1948); *Sipuel* v. *Regents of University of Oklahoma*, 332 U. S. 631 (1948) (*per curiam* opinion). On the fuller record, credit would seem to redound more broadly to most, if not all, members of the Court.

3. Jaffe, "Foreword, The Supreme Court, 1950 Term", 65 *Harv. L. Rev.* 107, 113 (1951).

4. In an indirect way there is a suggestion of confirmation for this view in 62 *Time* (No. 12) page 22:

"A friendly, folksy Kentuckian who sprinkled his conversation with such expressions as 'sure as God made little apples' and 'sound as old wheat in the mill,' Vinson had a political knack for charming even those who were opposed to him. It was this talent, and not Vinson's stature as a lawyer or a judge, that prompted Harry Truman to appoint his good friend as Chief Justice in 1946. The High Court was shaking with personal feuds. . . . Harry Truman wanted easy-going Fred Vinson to quiet the clamor and pull the court together.

"By quietly reasoning with the quarreling Justices, Vinson muffled the unseemly uproar; but he did not pull the court together. There were dissents in 50% of the cases in the term before Vinson became Chief Justice, compared to 62% in his first term and 80% in his last."

the development of apparently more "relevant" criteria:

> The way in which the President or the public conceives the task of the Court affects the character of the appointments. There is irony in the possibility that the "realists" who insisted for so long that the Court's work was not law but politics have made good their claim. The task being politics, the President may think himself justified in his belief that it can and should be performed by politicians. The brand of politics will not necessarily satisfy the hopes of the "realist", and so the endless chain of criticism, of action and reaction, of new remedies and new disappointments.[5]

It is no less true, however, that the way the Justices themselves—by whatever standard chosen—conceive their own task substantially influences the performance of that task. For inevitably a man's conception of his job will shape his behavior in that position.[6] And in the formation of their views of the Court, the present Justices undoubtedly received some of their schooling, at least indirectly, from the legal "realists". An American lawyer alive today could hardly escape the influence of the oft-repeated themes, not only that the work of the United States Supreme Court is political, but that in doing it, judges follow their personal preferences.

In fairness, at least to the better legal "realists",[7] it should be noted that their own discussions were not quite so crude and oversimplified. Implicit faith in the decisive power of formal doctrine plus rigid deduction did receive but short shrift at their hands; they did indeed point up political, social and psychological factors. And they may have overstressed the latter, for those were the elements that the earlier tradition, by either convention or ignorance, had apparently ignored. But their work did not end there—nor did they (or at least the better of them) think it did. That the old dogmas did not in fact control the judicial process did not necessarily imply that the process was inscrutable or uncontrollable; that the judges were men, and law a means of social control, did not mean that decisions had to be capricious and unpredictable. Rather, these discoveries only meant that real understanding, prediction and control had to be sought elsewhere and in new directions—in the common loyalties and training of the judiciary, in their felt responsibility, in institutional structures and in the focus of public attention, for example. And they began to stake out the boundaries of these new inquiries.

The Realist Approach Was Oversimplified

But a prospectus of work to be done is far less inviting than announcement of discoveries—even partial ones; qualified statements are not as dramatic as absolutes. Thus, as the "realist" position gained acceptance, oversimplified and generalized versions of their approach achieved currency. Buttressing this development was contemporary history. This was the early "New Deal" period. To many people, the Court's activities appeared to evince the major truths that the "realists" had advanced: political judgments were involved in the work of the Court, and the personal politics of judges determinative of their decisions. Then, if confirmation were still necessary, those who wished could soon find a "controlled experiment": a change in the personnel of the Court did bring about a change in orientation and ultimate decision. Only more dimly—if at all—was it perceived that these events did not establish the impossibility of rational control, but only that the old doctrines were ineffectual restraints. Brushed aside were many other complex factors which influence decisions. That the "political" judgments of the Court might represent more than the unvarnished social theorems of the nine individuals who happened to be appointed to that bench was ignored—either simply, or with a brief, formal obeisance in the direction of traditional dogma. That men might change upon assuming the responsibilities of judicial office, that they might feel less free as judges than they were as partisans to vent their own personal theories from the bench, that they might seek with some measure of success to control and compensate for their emotional reactions was either forgotten or disbelieved. Unknown, ignored or dubbed as exceptions were instances of men who, upon assuming the robe, spoke with a new tongue.[8]

In the minds of some, the growth of the new attitude was fortified by yet another factor. Having witnessed what they deemed roughshod activities of the "old" Court in striking down social and economic legislation, many "liberals" were wary of developing restraints on themselves that their "opponents" might cast off upon regaining power; in Professor Paul Freund's terms: "Our age is contentious and frenetic, inclined to distrust the force of standards which one's adversaries may choose to ignore, inclined to seize its own innings and impatiently mark up victories and defeats day by day".[9] At least so long as the Justices' views accord generally with one's own, such an attitude would tend to promote (and in turn be stimulated by) a concept of the Court's work as

5. Jaffe, *supra* note 3, at 107.

6. To be sure, an individual is frequently enough influenced as well by an idea of what his job ought to be. But that, in turn, is most often molded in large part by his impression of what the position in fact is.

7. The use of this term is not intended to imply the existence of a "school". See Llewellyn, "Some Realism about Realism—Responding to Dean Pound", 44 *Harv. L. Rev.* 1222, 1233-34 (1931): "One thing is clear. There is no school of realists. There is no likelihood that there will be such a school. There is no group with an official or accepted, or even with an emerging creed. . . . New recruits acquire tools and stimulus, not masters, nor overmastering ideas. Old recruits diverge in interests from each other. They are related, says Frank, only in their negations, and in their skepticisms, and in their curiosity. There is however, a *movement* in thought and work about law. . . ." If the term "realists" still needs definition at this date, this writer will accept Professor Llewellyn's description, *Id.* at 1233-56.

8. For several specific instances of such men, Freund, *On Understanding the Supreme Court* 45-47 (1951).

9. *Ibid.*, at 75. Of course, in a significant sense, this is itself a "self-fulfilling prophecy." See *infra* text at note 13. One who on this basis refrains from imposing controls on himself might well expect this adversary to do the same. And so on—unless the cycle is broken—ad infinitum.

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politics and its decisions as dictated by the preferences of the incumbent personnel.[10]

By some combination of these patterns and others, the "realist" preaching that the Court's work was politics as well as law achieved currency as a pronouncement that it was wholly politics and not law; the proposition that a significant personal element affects judicial decision emerged in a form in which that personal element was apparently completely triumphant over all other factors. As Professor Jaffe has indicated, Presidents may well have been influenced by this conception of the Court in their selection of Justices. The influence of these views does not seem to have stopped there, but to have reached to the Court as well.

Aside from general dissemination of these views, commentaries on the work of the Court began to carry an oversimplified "realist" flavor. Indicative of this development, and encouraging it, has been the appearance of many tabular studies of the votes of the individual Justices as "for or against" labor, civil liberties and the like. Put aside in the making of such tables is the fact that cases frequently involve more than those problems alone. The "labor" side may be asking for relief requiring unwise intervention by a federal court in areas of state operation; a "civil liberties" contention may be framed in a manner which first presents a substantial issue of relations among several states.[11] If decisions were in fact exclusively the product of each individual's politics and sympathies—and if one assumes a known clear hierarchy of such values—then complexities like these might well be ignored. But, on the other hand, even if reality is not quite so simple, publication of such tables and articles under respectable aegis lends credence to the notion that it is. By such means was the prevalent generalized version of the "realist" position brought directly home to the Court.

Although probably no Justice has fully accepted the oversimplification, it does seem to have been a significant factor in the thinking of members of the Court. And as this view of the Court's work was assimilated into the conceptions of its Justices (either incumbent or to-be), the original partial truths progressively became in fact more and more the whole story; for men who believe that decisions of Supreme Court Justices are always wholly matters of personal politics and predilection will not hesitate to decide their own cases on that basis. This development might go far to explain the unusually high number of separate concurrences and dissents, the not-so-rare failure to achieve an "Opinion of the Court", and "the feeling that the vote of this or that Justice is only remotely controlled by his apprehension of the legal issues and represents a judgment based on collateral considerations".[12]

Justices' Ideas of Job Remold Judiciary

In this aspect, the views which had originally stemmed from the "realists"—by influencing the Justices' conception of their job—helped to bring about a judiciary much closer to the image previously depicted by those views. This pattern of a doubtful claim causing its own fulfillment is not an uncommon one; sociologists have identified it generally as the "self-fulfilling prophecy". In a leading article describing that concept, Professor Robert K. Merton defined it as ". . . in the beginning a *false* definition of the situation evoking a new behavior which makes the originally false conception come *true*".[13] He cites several examples. One is that of the labor unionist declaring that Negroes are "scabs" and antiunion; acceptance of this idea results in the exclusion of Negroes from union membership; thus barred, many Negroes are indeed forced to take jobs that are available to them only because of strikes—thus retroactively justifying the original "definition of the situation". The pattern is no less identifiable in the area of our concern merely because the falsity of the original "definition" lay in its partial truth.

To the extent that this development has been a factor in the evolution of the present Supreme Court, the sociological analysis highlights the difficulty of finding any solution for the problem. For as the original, partially true conception progressively fulfills itself, it tends to confirm the initial belief, thus stimulating further development in the same direction. It becomes difficult—and futile—to argue that the original idea was wrong and that things were not always as they apparently are. To argue that in any event they should not be so is hardly more effective, particularly where, as here, the original "definition" warns against any self-limitation that others might refuse to follow.[14]

Nevertheless, halting of this trend does not seem impossible. To some

10. What this ignores, however, is that such a concept once prevalent will probably survive changes in the Court's make-up.

11. *Cf.* Freund, *op. cit. supra* note 8 at 66-67.

12. See page 680 *supra*.

13. Merton, "The Self-Fulfilling Prophecy", 8 *Antioch Review* 193, 195 (1948). Perhaps it is worth noting specifically that the word "prophecy" is here used not in the sense of conscious prognostication, but rather as a description of what apparently happens in fact.

14. See text at note 10 *supra*.

extent, influences much like those which gave it momentum could help serve to arrest it. If, for instance, professional commentators on the Court's work should begin to focus more on the objective resolution and analysis of the issues before the Court and less on the personalities or politics, might it not be reasonable to expect some reflection of this attitude in the Court's own approach? A "definition of the situation" provided by admirers would seem no less useful as a basis for a judge's "self-fulfilling prophecy" than any other. Indeed, being more welcome, it might exert its effect all the more readily.

Beyond any such outside influences, developments within the Court itself might help reverse the pendulum's swing. Readiness to adopt a new approach might well be prompted by discontent with unanticipated side effects of the original view. The range of events which might militate in that direction seems wide. A particular run of cases, or possibly a single case (perhaps even the school segregation cases) might serve to highlight the problem. A significant change in the climate of professional and public opinion might bring about a reexamination of premises thought to be settled. These are only the most obvious examples of circumstances which could prepare the way for the acceptance of a new concept of the Court's task.

The particular new approach might be crystallized by the inevitable changes in personnel wrought by the passage of time. Not that such changes would necessarily have that effect. But even a single individual with a different conception who earned the respect of the others for his professional and intellectual ability and for the integrity of his purpose could vary the Court's concept of its job in the direction of greater institutional awareness. On the other hand, neither is such new personnel a prerequisite to change. The unanimity of the school segregation cases suggests the present existence of an institutional sense which might well begin to operate more generally. The incumbents can hardly be considered uniform in their attitudes toward the Court's function and operation. The same factors which would facilitate the acceptance of a different approach from a new appointee might well serve to bring to the fore voices long present, but not dominant, within the Court itself.

Court's Authority Depends on Institutional Pride

By means such as these, appreciation could be heightened of the basic problem, that in the long-run continuance of that public confidence which is the ultimate foundation of the Court's authority may depend upon a more general resurgence of institutional pride and action. Such an awareness, without more, would constitute a major step toward solution. For it would affect a host of separate actions, each important in its own way, from the preparation of a contemplated majority opinion to the writing of a separate dissent. The attitude with which such tasks are undertaken plays a formidable role in the problem with which we are concerned, and it is that attitude which an awareness of the problem would shape.

But the development of such an awareness, though indispensable, may not itself suffice for the day-to-day long run. General concern may yield in the face of the immediate pressures of individual cases; one judge not infrequently may see the need for "institutional unity" largely in those cases whose merits are most important to a colleague. Moreover, the Bar can play its part in the development only on the bases of known patterns of operation. If lasting results are to be achieved, it will probably be necessary to agree upon norms and criteria of operation as means to the desired end. It seems to be this which Professor Merton suggests when he states that "the self-fulfilling prophecy . . . operates only in the absence of deliberate institutional controls".[15]

At least some of the material for such "controls" here seems readily available; carefully evolved, they could help strengthen the development of which they are a part. One specific example may be useful to illustrate these propositions. The tradition of Anglo-American common law contains a requirement—long since held applicable to the national courts by virtue of Article III of the Constitution—that only "justiciable cases" may be the subjects of adjudication. Within this concept, only issues arising out of specific facts are meet for judicial determination, and then only in factual context; its corollary is a prohibition against advisory opinions on abstract questions. Related and overlapping is the demand that the particular party before the court have "standing" to present the case. If the judicial system is the major institution of government whose power may be invoked by an individual, at the same time any individual may rouse it only on concrete problems which are peculiarly his.

These doctrines embody substantial considerations as to the functions of courts. Even fully granting the major importance of political factors in a court's work, nonetheless its function is not general legislation. The very basis for judicial power is that there are differences—particularly in appreciation of detailed implications—between prescribing a general rule and applying it to specific cases. The latter not only calls in any event for wise discretion, but is frequently aided by an accumulation of experience under a law, both generally and as demonstrated in the specific case.[16]

In these focused insights which a factual context affords lies the rele-

(Continued on page 725)

15. Merton, *supra* note 13 at 210.

16. To be sure, there is involved in such an approach a period of uncertainty and possibly of delay until the Court has spoken. Nevertheless, there would seem to be no better way to aid a judge "not to confuse a climate of opinion with the heat of the day, not to mistake the gusts of a local storm for the steady winds of doctrine." Freund, *op. cit. supra* note 8 at 18. And, as the text attempts to indicate, in the long view the standing of the Court may be hurt quite as much by too great eagerness to decide abstract questions as by delay.

AMERICAN BAR ASSOCIATION

Journal

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EDITORIAL OFFICES

1140 North Dearborn Street.....Chicago 10, Ill.

Signed Articles
As one object of the *American Bar Association Journal* is to afford a forum for the free expression of members of the Bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of the *Journal* assume no responsibility for the opinions or facts in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

■ *The End Crowns the Work*

At our 77th Annual Meeting, we lawyers of America will dedicate a Temple of Justice. That of which our old men have dreamed dreams and our young men have seen visions will come to pass. In the measure that we have prospered in the service of Themis, we have brought to her our tribute to be devoted to the construction of her temple. How blest are we that we are beholden to no ruler's subvention for this noble fane and can there worship justice according to the dictates of our own conscience.

Those who gave and raised the money that made possible this great laboratory have done more than perform a difficult and necessary financial task. They have kept the independence of the Bar. Liberty and property are inseparable. He who controls my means of existence controls my actions. If our temple were not our own it would not surely be a source of truth, as we hope to make it, but perhaps a source of propaganda for whoever subsidized it. Pleasant it would be to have a great government palace set apart for the Bar as a division of a ministry of justice. Pleasant it would be never to have to delve into our pockets for bar association contributions, and pleasanter still never to have to ask our fellows to do the like, but if that pleasure were bought at the expense of the acceptance of subsidies it might all too readily become a concomitant of a parasitic Bar composed of bureaucratic sycophants.

Our beautiful new house is our own. No one can ever direct us to distribute from its committee rooms reports that will parrot support for the line of some clique in power. The labor of those who earned and garnered the money that made possible this great fountain of justice has safeguarded the purity of the stream that is to flow from it.

Forces are abroad that would, if they could, subvert the independence of all of us who advocate the liberty of the individual. The Bar's highest duty is to defeat those forces. From our Temple of Justice, the citadel of our own convictions, we can carry on that fight untrammeled by entangling alliances. To keep faith with those who have fulfilled the dreams of age and the visions of youth we must never forget that it is a monument to independence.

■ **The cover for this month's issue of the *Journal* was specially designed to commemorate the dedication of the American Bar Center on August 19. The Administration Building, which will house the Association's Headquarters, is depicted on the front cover, while the Research Building appears on the back cover. The artist who designed the cover is John T. Armbrust, of Chicago. The space for the back cover was donated by the West Publishing Company and the American Law Book Company.**

■ *Law Books for the Far East*

Much has been said and much done to persuade the people of the world that our Republic offers the best foundation on which to base the liberties of our citizens. The Government of this great Republic rests securely upon our Constitution and under this constitutional republic we have advanced far toward making life easier and pleasanter for our people.

Liberty under law has been one of our proudest boasts. We know at what cost it has been secured, and we realize full well the constant struggle necessary to maintain it. It is not easy to convince people who have known only oppression and poverty, who have been denied the good things of life and who have come to expect nothing but hunger and squalor that if they will follow our example, there will be light in the dark places and hope for better days ahead. This presupposes the adoption of constitutions similar to ours and the establishment of wise and just laws.

During the last two years, Chief Justice Robert G. Simmons of the Supreme Court of Nebraska, by his own effort, has done much to aid in the promotion of friendly relations between lawyers of the East and our own Bar. He has visited with leaders in Japan, the Philippines, Formosa, Thailand, Burma, Indonesia, India, Pakistan and Ceylon. He knows something of their problems, and he says these people "are hungry for American law books". They cannot buy them, but if they could be

found, they would be used in these Oriental lands "just starting on the path of constitutional government under written constitutions" patterned after ours in many respects. The judge says in his letter published in this issue in "Views of Our Readers", that "The lawyers of America can do a great job if they will make available to men of our profession in the Orient the means of understanding the how and why of our laws" by sending them encyclopedias and texts, especially on constitutional law, that can be spared from their own shelves. He will furnish names and addresses of courts, schools and bar associations that would appreciate such books. Read his letter. In projects like this, it is always for the Bar to take the lead.

■ *No Fetters on Competency*

This is the time of year when thousands of young men who are in their final year in law school are preparing for bar examinations. It is highly important that they prepare thoroughly, for bar examinations are difficult and failure to win a passing grade is a grievous disappointment for the unfortunate applicant, his family and friends. Possibly no other vocation submits applicants for membership to an examination in learning and a scrutiny of character more exacting than does our profession.

At this season of the year the prospective lawyers face not only the test submitted to them by the bar examiners, but another equally vital: In which state shall they locate? Generally, the choice that is made concurrently with the taking of the bar examination is final, for in most instances the rules governing admission to the Bar anchor the young man to the state of his first choice.

If a clergyman, banker or engineer, after beginning his career in one state, discovers that a distant place offers superior advantages he can readily transfer to it, but in the legal profession the practitioner who wishes to embrace greater opportunities in another state soon learns that they are beyond his reach unless he can surmount formidable barriers which the profession has erected.

Many jurisdictions require an attorney who wishes to apply upon certificate to establish a local residence before he files his application. Some demand that the residence be maintained for a given period, such as six months, before application for local admission can be made. After the residence has been established and the application has been filed, there then comes a period of waiting which in some states is long. In that period the applicant's fitness for local admission is undergoing investigation and a report upon it is being compiled. When the report has been completed, it is first submitted to the board of examiners and subsequently to the court, together with the board's recommendations. An increasing number of states delay still further the admission of an applicant-attorney by requiring him to submit to a local examination which is termed "attorneys' examination". The examination, in some instances, is imposed by express rule and in others by an order of the board which exacts it in aid of the board's discretion.

The profession, in its efforts to see to it that none but the worthy are admitted to the Bar, is entitled to the acclaim of all who revere the administration of justice and who believe that the practice of law should be confined to those who are honorable and capable. The rules and regulations which have won for us the high standards of today represent the enlightened efforts of men who cherished high standards and who worked over a long period of time to gain them. The attorney who has met faithfully those exacting tests should have a right to feel that the license issued to him is a valuable one.

The barriers which the states erect at state borders against the admission of attorneys from other states, unless administered with no purpose except the exclusion of the unworthy, discount the hard-won right to practice law. Clearly, the incompetent should not be permitted to transfer from state to state, but all who wish to change their location are not misfits or wrongdoers who are fleeing from impending disciplinary action. Some who wish to move have found that their original choice was an unfortunate one, and others are prompted to move because their superior ability has won recognition in a larger center. In excluding the incompetent and the unworthy we must not employ methods whereby those who will bring with them honor and great ability will be deterred from even applying. Ours, a learned profession, ought never to place fetters upon recognized competency.

Editorial from a Member of Our Advisory Board

■ *Thaddeus Stevens and His Arrogant Associates*

Current events and the excellent article by Mr. Lewis, in the January issue of the JOURNAL on the attempt by a headstrong, power-intoxicated majority of Congress to impeach President Andrew Johnson in 1868 and assume to itself a legislative dictatorship of the United States, suggest that a timely warning from history may not be amiss. We are still paying the price of misunderstanding for the despicable and vengeful politics of the "Reconstruction Policy" of the sixties, and it is obvious from the story that Thaddeus Stevens and the other congressional fanatics (some of them, I regret to say, from Massachusetts) would have attempted the same treatment of President Lincoln, if he had lived, which they applied to President Johnson. I remember reading, about fifty years ago, DeWitt's vivid book *The Impeachment and Trial of Andrew Johnson,* and the story also appears later in *The Tragic Era* by Claude Bowers. The story, while intensely dramatic, was not only "tragic", but a disgusting exhibition of what Ham-

let described in his soliloquy as "the insolence of office".

In *The Federalist*, Number LI (February 8, 1788), Hamilton wrote:

> In framing a government, which is to be administered by men over men, the great difficulty lies in this. You must first enable the government to control the governed: *and in the next place, oblige it to control itself.*

This last clause is the most difficult to accomplish. Accordingly, the Constitution did not, and does not, contemplate arrogance or insolence in any of the three departments of government. Of course, human beings being what they are, this kind of disease is bound to crop out at times even in our form of government, but it needs watching. Mr. Lewis' article in the January JOURNAL or the books referred to above should be read by anyone interested in the history of his country. There is, of course, some consolation in another line from Shakespeare about "vaulting ambition, which o'erleaps itself" and old Aesop's fable of "The Frog and the Ox".

FRANK W. GRINNELL

Boston, Massachusetts

A Knight in Shiny Blue Serge: Advice to Young Lawyers

by Will R. Wilson · Associate Justice of the Supreme Court of Texas

■ **Addressing the newly admitted members of the Texas Bar at the swearing-in ceremonies in Austin last April 27, Justice Wilson gave some advice to the young lawyers which, as often happens, is equally good for their elders. He divided the legal profession into three kinds of lawyers: the technicians, the craftsmen of the law and the crusaders.**

■ Today as you cast off the role of law student and become a lawyer, it is fitting that we take these few minutes to think about the kind of lawyer you are going to be. Of course, you must first learn what very few of you now know. You must become skilled in the use of your tools to accomplish the bread-and-butter uncontested matters which pay the rent for a beginning lawyer. You must learn how to close a real estate transaction so that everyone is protected when the money changes hands. You must strike the right tone for a client looking death in the face and wanting to dispose of his property. You must learn how to release a client from jail on habeas corpus. I suspect that most any experienced deputy sheriff actually knows more about the operation of the writ of habeas corpus than you do now. In short, you must first become a technician.

Some of you will never be more than technicians. A great many will become extremely skilled technicians and be the craftsmen of the law. As a legal craftsman, you will develop a sure fast skill at drawing a note and deed of trust which squeezes the turnip dry, a skill in filing a divorce suit accompanied by injunctions and other remedies which right from the start ties the opposite spouse hand and foot, a skill at taking a release in a personal injury settlement from which there can be no escape, and at drawing and executing a will so that no one can break it.

As a skilled craftsman, you will probably find a ready market for your work and receive a good living out of it. But you will miss entirely the most satisfactory part of the law practice. That is the quest for justice. I hope at least a few of you will rise above mere craftsmanship. I hope you will set your sights upon a vision of justice. This can be one of the intellectually challenging aspects of our materialistic and, in some ways, unromantic period. I hope a few of you will be unsophisticated enough to look beyond the cash in hand and, contrary to the poet's advice, respond to the brave music of a distant drum. I hope you will be uncynical enough to have always an interest in a crusade of one kind or another —either civic or political, or, as most crusades are and always have been, both civic and political. One of the admirable aspects of the legal career of Mr. Justice Brandeis was his willingness to litigate suits involving public questions, such as the tramfare cases, where there was no possibility of a fee. President Jameson, of the American Bar Association, has said that the American lawyer devotes a substantial percentage of his time to legal matters where there is no possibility of a fee. But regardless of that, I hope you will dignify the daily work of your practice by a small private crusade of your very own—a continuing quest consistently pursued through the thirty or more years of the practice of law which lie ahead of you, for fairness, for decency and for justice. You should be guided by a basic desire to be fair and decent to everyone—a basic desire which could become your own personal and very private Holy Grail.

Some lawyers never catch the vi-

sion. A great many start with it but soon lose it under the daily pressure of making a living. The old woman's remark, "Life is so daily, ain't it?" surely is true of the law practice. But you must fight to retain your intellectual independence. You must not let your client's interest dominate your sense of justice. If you are defending a civil suit, your duty to represent your client does not include any duty to deny liability in the knowledge that a lawsuit is long, hazardous and uncertain, when you know your client is liable. In representing a plaintiff, you have no duty to exaggerate the damages and sandbag a defendant. In representing a defendant workman's compensation carrier, you should not starve out a claimant in order to obtain a forced compromise. In representing a defendant in a criminal case, you have no duty to plead a man "not guilty" and help him shape up his witnesses for an alibi when you know he is guilty as sin. You have no duty to devise clever schemes by which a client may evade the law.

In my first year in the law practice, I had it drilled into me that a lawyer should be his client's conscience. If a client does not look to and readily follow his lawyer's advice on the right and wrong of a situation, he will soon have another lawyer. If you ever advise a desirable client to take a particular path which he thinks is morally or ethically dubious, you have lost a client. A client instinctively wants his lawyer's sense of right and wrong to be sound. The time may come when he must necessarily place himself completely in his lawyer's hands. And, for that very reason, you will find that one of the greatest satisfactions to be gained from the practice of law is the enjoyment of the complete trust and confidence of your clients. And you will find that one criterion by which to distinguish a lawyer with a vision of justice from the mere craftsman is the degree of trust his clients give him. But it is not easy to follow the glimmer of a distant and nebulous quest for justice. Especially is this so when it involves telling a client that he has not been fair to another person. But you will find that the client respects most the lawyer who gives a firm "no" to doubtful proposals.

And a client wants his lawyer to be both a courageous man and a wise man. This quality of wisdom depends, in part, upon a proper evaluation of past experience. You ought not to make the same mistake twice. And you should learn from the mistakes of others. One sure way to broaden your wisdom is by the constant study of the past. To prepare yourself for the practice of law, you should constantly read biography—especially the biographies of people who have lived and worked in the law. From this you will acquire your standards of value. If your mind is stored with an intimate knowledge of the lives of our past lawyers and judges, you will be surprised how often they voluntarily step forward to make a decision for you. This might be called precedent, but that word hardly describes the mental process. When you have a decision to make, it is comforting to know how John Marshall or John Adams or Jim Hogg or Charles Evans Hughes or Brandeis handled a similar problem. And you will be surprised at the depth of perception the study of history will give to your daily decisions.

Regardless of your theological views, or lack of them, as a lawyer, a quest for justice should be your own private approach to religion. As a lawyer, it ought to hurt for the law to reach what seems an unjust result. When this happens, it should serve as a stimulus for you to exert yourself to change and correct the law. The perfection of the law ought to be your goal.

With even mediocre vision on your part, the challenge in a law practice is unlimited and the problems are deserving of your best intellectual effort. If you, as a beginning lawyer, will make hard work the rule of life and set your sights upon a vision of justice, you will find the practice of law a thrilling and exciting way to live. You will count the trust and confidence of your clients your most tangible asset. You will always, in your secret heart, look back to the taking of your oath as an entry into a very personal and private sort of knighthood. For the first several years you may think of yourself as a knight in a shiny blue-serge suit. But you can be certain that the material rewards will come too as your skill acquired by hard, close work produces results for your clients and your integrity wins recognition.

Will R. Wilson was elected to the Texas Supreme Court in 1950 and is one of the youngest men ever to serve on that court. A native of Dallas, he served as Assistant Attorney General of Texas in 1941-1942 and as District Attorney of Dallas County from 1948 to 1950. During World War II, he saw combat in New Guinea, Biak and Luzon. As commanding officer of the 465th Field Artillery Battalion, he accepted the surrender of the forces of General Yamashita.

The Oklahoma Survey:

An Objective Study of Public Service of Lawyers

by **Hicks Epton** • of the Oklahoma Bar (Wewoka)

■ **A chance remark at a social gathering raised the perennial question whether professional men do actually render "public service". Inquiries disclosed that no statistics on the question were available. The upshot was a survey of public service rendered by lawyers in one state that should be of interest to the whole profession.**

■ "There is no justification in the state's spending large sums of money in the education of professional men."

This statement was made in an old-fashioned "talk fest" of a group of lawyers, other professional people and businessmen. The writer responded, perhaps feebly, that the state makes an investment in professional people which is repaid with public service by the trained professionals. The accuracy of my answer was challenged, particularly if we meant lawyers. It was conceded that if professionals, including lawyers, actually rendered gratuitously the public service we pretended, then the state's expense in educating them might be justified. There was no point in arguing to laymen that the practice of law was inherently a public service. Even some of the other professional men present conceded that their practice is primarily mercenary. They remarked with sober mien that we lawyers have no special claim to a halo for our profession.

We wondered if there had ever been an objective survey of any professional group in any area to determine actually and specifically what public services its members performed above and beyond, and distinguished from, routine professional services. We made diligent inquiry of the leaders of many professional and trade groups and found none. The Director of the American Bar Association Committee on Survey told us he knew of no such effort or survey. The idea apparently was new.

The apparent need for such a survey was outlined to the Central Committee of the Oklahoma Bar Association. The writer, who was then President of that Association, was directed to procure the survey if finances could be arranged and competent technicians employed. The fees usually paid by commercial organizations for services of this kind were beyond our ability to pay.

We then turned in desperation to the Bureau of Business Research of the College of Business Administration of the University of Oklahoma, which does outstanding work in many areas of fact ascertainment. Its Director, Francis R. Cella, was enthusiastic. He and his staff undertook it with the agreement we would pay postage and other incidental expenses. He immediately started his staff to work.

Hicks Epton was admitted to the Oklahoma Bar in 1932 after being graduated from Oklahoma University. He was President of the Oklahoma Bar Association in 1953 and has been a member of the National Conference of Commissioners on Uniform State Laws since 1945.

We appointed a survey committee, each member selected because of peculiar fitness, to give assistance to those actually conducting the survey. We proceeded on the premise that while we were concerned with the results, good or bad, shown by the survey, we could not control or color them.

As Mr. Cella pointed out in his summary of the survey:

> . . . the leaders of the Oklahoma Bar Association made it clear at the out-

set that they were willing to accept the results of the survey. These stipulations were adhered to on the part of the legal profession throughout the study.

Nevertheless, the committee was necessary to suggest the general scope and fields into which the survey might go. It was most helpful in seeing that those who were in the survey "sample" responded.

After several months of intensive study and work, the survey was completed and was made public on November 20, 1953, and was published in the *Oklahoma Bar Journal* (Volume 24, page 2121). It has already received wide circulation and has stimulated real public and professional interest.

As indicated, the survey was made by the "sample" method. Mr. Cella outlines in the full survey report, the method of selecting the samples and conducting the survey. He concludes:

> As a result of the careful planning and cooperation, results were obtained from the survey which contained a sampling error of 3.4 per cent. A smaller sampling error in a survey would have made the results suspect of bias.

Basically, the survey consisted of eighty-nine separate and specific points of inquiry. They probed the details of lawyers' participation in fraternal organizations, business clubs, patriotic organizations, civil defense and military, church, cultural clubs, educational clubs, youth clubs, sponsoring and managing of recreational facilities, charitable and welfare organizations and professional activities.

To those interested in details of the survey, printed copies of an abbreviated summary are available; space does not permit even an outline here.

We discovered many unsuspected and interesting facts about ourselves, a few of which follow. The survey showed only 70 per cent of our lawyers were in private practice serving the public generally; 4 per cent were employed by a single client, 26 per cent were either out of the state, no longer practicing law, were in public office or had died since our directory was prepared. There has been speculation by the Committee on Survey of the American Bar Association as to the cause of the great concentration of lawyers in Oklahoma. This may be a part of the answer.

Of surprising interest is the membership in and leadership of lawyers in religious organizations. Eighty-six per cent of all lawyers are members of churches or synagogues and 50 per cent are very active in church work; 21 per cent had been officers in some type of church organization. Perhaps this indicates that lawyers have often carried a cynicism on their sleeves which was not in their hearts.

Of further interest is the fact that 30 per cent of our lawyers have been practicing law nine years or less and 48 per cent less than twenty years, while 52 per cent have been practicing over twenty years. A definite trend of younger lawyers towards the large communities is indicated. The lawyers show an average work week of 46.7 hours of legal work.

Of paramount interest is the legal work performed for which no compensation is expected. The report summarizes this in the following language:

> The variation in the hours of uncompensated legal services by the lawyers is wide, with the number varying from one hour per week up to more than 20. Nearly 23 per cent of the lawyers spend 5 to 6 hours per week in unpaid legal work and 65 per cent spend 1 to 6 hours in such unpaid services. Only 5 per cent of the lawyers do not perform any unpaid legal service.

In like manner, we learned specifically what we were doing in eighty-nine avenues of public service—Boy Scout work, fraternal organizations, Red Cross and all the others.

The survey has been a genuine stimulant to our morale. It confirms what many of us knew was true but could not prove.

While Oklahoma lawyers are too close to their Texas brethren to claim any undue modesty, nevertheless, we believe the results of a similar survey of any other group of lawyers anywhere would produce substantially the same results.

We, in Oklahoma, are gratified with what was found by this objective survey. We are dedicated to even greater public service—a service for which lawyers are peculiarly qualified by training and experience.

Symposium on Unauthorized Practice

■ The Committee on Unauthorized Practice of the Law will sponsor a "Symposium of Experts on Current Problems" in that field during the Annual Meeting in Chicago. The symposium will be held on Sunday and Monday, August 15 and 16, in the Conrad Hilton Hotel. The subjects to be covered will include state bar activities, remedies, recent litigation, relations with various lay groups, and recommendations.

The speakers on Sunday will include Edwin M. Otterbourg, of New York City, former Chairman of the Association's Committee on Unauthorized Practice of the Law; F. Trowbridge vom Baur, of Washington, D. C., Chairman of the Administrative Law Section's Committee on Administrative Practitioners, Admissions and Ethics, and H. Cecil Kilpatrick, also of Washington, D. C., a member of the National Conference of Lawyers and Certified Public Accountants.

The Monday sessions of the symposium will be devoted to reports of unauthorized practice of law activities by state and local bar associations. Speakers will include Judge Earl P. Hall, Austin, Texas; Melvin F. Adler, Fort Worth, Texas; William L. Murphey, of Los Angeles, California; Charles Goldstein, Detroit, Michigan; and Charles Leviton, Chicago, Illinois.

The symposium will close with remarks by members of the American Bar Association's Committee on Unauthorized Practice of the Law.

Code of Ethics Adopted by Questioned Document Examiners

by Ordway Hilton and Clark Sellers

■ Law decisions in recent years show that judges have been giving increasing weight to expert testimony concerning handwriting, typewriting, paper, ink and other questioned document problems.* This progress has come about first through adoption of scientific methods for examining documents and second through improvement of laws and legal procedures. Numerous decisions have been handed down by appellate courts permitting a more complete and satisfactory presentation of scientific expert testimony.

However, during this period of progress in the fields of questioned document examination and expert testimony, there has not been a forthright declaration of principles by which the legal profession or the public could judge the ethical standards of document examiners. Despite this condition there have been outstanding practitioners who have maintained the highest personal codes of ethics. Throughout the country the legal profession knows of the strict principles adhered to by many leading document examiners and other forensic science specialists. These men by their example have done much to raise the general level of professional conduct. Nevertheless, the lack of any written code to serve as a guide and standard has led to regrettable practices by a few. Consequently, since its organization in 1942, the American Society of Questioned Document Examiners has been discussing the drafting of a concrete code for ethical practice, and recently has completed this task.

The American Society of Questioned Document Examiners is an organization devoted to scientific progress and research, education and high ethical standards. In fact, the strict ethics of its members, who include outstanding consultants in this field of work, has been one of its foremost objectives. In Article 2 of its constitution each member is required to pledge himself "to maintain the ethical, educational and technical standards of this profession", and "to create confidence in this important field of work through exemplary conduct, high character, and strict ethical standards". Thus, two of the five subsections on the purpose of the Society deal with principles of ethical conduct.

Despite these definite statements on proper professional conduct as set forth in the Society's constitution, its members felt a further need for expressing these principles more fully in the clear and concise language of a formal code of ethics. It was also hoped that the principles enunciated in the code would serve as a guide to other document examiners who are not members of the Society and that it might have an influence on those who are at work in the broad field of forensic science. Certainly in principle the code is applicable to all professional expert witnesses regardless of the specialty in which they may be engaged.

The Code of Ethics which has been adopted and subscribed to by all members of the American Society of Questioned Document Examiners is set forth below.

Code of Ethics

AIMS AND IDEALS. The American Society of Questioned Document Examiners has for its purpose the promotion of justice through the discovery and proof of the facts relating to questioned documents, and to maintain and advance the technical and ethical standards of the profession of Questioned Document Examination.

The members of this Society dedicate themselves to the accomplishments of the above purpose by proving fraud and upholding genuineness in documents, and by exposing the guilty and protecting the innocent.

APPLICATION. In furtherance of these Aims and Ideals each member of this Society pledges himself to abide by the following rules of conduct:

1. To apply the principles of science and logic in the solution of all document problems and to follow the truth courageously wherever it may lead.

2. To keep informed on all new developments and processes in document examination by constant study and research, with a full realization that accuracy is possible only through competence.

3. To treat information received from a client as confidential; and where a matter has already been un-

*"The unanimous testimony of the attesters may fail of credit even though the only opposing evidence is that of the alleged maker's handwriting as analyzed by expert witnesses. The circumstantial evidence afforded by the handwriting may in a given case be more convincing than the testimony of the attesters. This possibility is one of the results of the modern scientific study of handwriting". John H. Wigmore, 3d Ed. Vol. IV, Sec. 1302, Cited in *In re Young's Estate* (Pa.) 32 A. 2d 901 (1943).

dertaken, to refuse to perform any services for any person whose interests are opposed to those of the original client, except by express consent of all concerned.

4. To render an opinion strictly in accordance with the physical evidence in the document, and only to the extent justified by the facts. To admit frankly that certain questions cannot be answered because of the nature of the problem, or from available material, or due to insufficient opportunity for examination.

5. To act at all times both in and out of court in an absolutely impartial manner and to do nothing that would imply partisanship or any interest in the case except the proof of the facts and their correct interpretation.

6. To give the best possible service in all cases, irrespective of the importance of the matter.

7. To charge for service on a basis which considers the extent and character of the services rendered, the importance of the matter, and the relation of the problem submitted to the controversy as a whole. Remuneration shall be fair and reasonable considering all of the elements in the case. No engagement shall be undertaken on a contingent fee basis.

8. To make technically correct and conservative statements in all written or oral reports, testimony, public addresses or publications, and to avoid any misleading or inaccurate claims.

9. To maintain a constant spirit of fairness, combined with high ethical, educational and technical standards, thereby promoting justice and creating increased confidence in the profession of document examination; and by exemplary conduct and scientific thoroughness carry out the aims and ideals of this Society.

Actually, this code is not new to the practice of the members of the Society or for that matter to many other document examiners of high standing both in private practice and in governmental service. It does, however, mark a definite step forward in that it places before the legal profession and the general public a clear-cut statement of how a document examiner should conduct himself and his practice.

Publication No. 1 of American Bar Research Center Now Available

▪ *The first publication of the American Bar Research Center containing a list of unpublished legal theses and of current legal research projects in American law schools is now available at the publication cost of $1.50. Until the opening of the Research Center, copies of this valuable publication will be available by writing to John C. Cooper, Administrator of the American Bar Research Center, 240 Nassau Street, Princeton, New Jersey. The Foreword to Publication No. 1 gives an idea of the valuable information made available through this booklet:*

▪ This is the first publication of the American Bar Research Center, created and administered by the American Bar Foundation through its Research and Library Committee.

Part of the work of the Research Center has been designated as the "Research Clearing House". The purpose of the Clearing House is to obtain information as to unpublished legal theses in the libraries and files of the accredited law schools of the United States, and also current legal research projects in such law schools. This information as received is catalogued and classified by appropriate subjects so that the Research Center may be in position to furnish information readily to those interested.

From time to time lists of such theses and research projects will be published. The present publication is the first of such lists. Supplements will be issued periodically.

This Research Clearing House could not have been set up without the co-operation of the accredited law schools of the United States. A large percentage of these law schools have replied fully to the requests of the Research Center for the needed information. They have contributed the valuable time of their library and teaching staffs in compiling the lists of desired materials. The organized Bar is indeed indebted to our law schools. The Clearing House can be effectively maintained in the future only through such continued co-operation.

Part I of this publication includes a list of unpublished legal theses showing the name of author, title of paper, date and the library where the thesis is on file. If any other library or any person interested desires to have access to any of these theses, arrangements must be made in each case with the depository library.

Part II, the list of current legal research projects, includes the name of the person engaged in each project, the subject matter and the place where the research is being carried on.

The classification of the items in these lists by subject has been prepared by Mr. Erwin C. Surrency, Law Librarian of Temple University Law School, Philadelphia, in his capacity as one of the Library Consultants to the Research and Library Committee of the American Bar Foundation. The Research Center is indebted to Mr. Surrency for the time and thought which he has given to what we feel will be a useful and worthwhile publication.

For the future guidance of the Research Center, the comments and suggestions of members of the organized Bar, law teachers, librarians, and others interested will be most welcome.

JOHN C. COOPER
Administrator
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Research and Library Committee
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Books for Lawyers

THE ART OF ADVOCACY: *A Plea for the Renaissance of the Trial Lawyer. By Lloyd Paul Stryker, New York: Simon and Schuster. 1954. $5.00. Pages xiii, 306.*

The trial lawyer has currently received boosts from two sources, one unexpected and the other expected.

The unexpected source is the Army-McCarthy-Schine hearing. Let *Life Magazine* tell it:

> If the hearings have proved anything to date it is that courtroom procedure, with its strict rules on conduct and introducing evidence, is a most marvelous human invention. If they have accomplished anything at all so far, it is something quite unexpected: they have provided a stage on which two lawyers named Joseph Welch and Ray Jenkins—though they often seemed shocked by what was going on around them, though they often seemed to be waiting for the judge to bang his gavel and end the nonsense—managed to impress themselves deeply upon the national consciousness.[1]

To this add that these same two lawyers have also impressed on the national consciousness that force of personality and nimbleness of wits remain important and that the concepts of orderly procedure are still as fundamental as when they required God to call Adam before ejecting him from the Garden of Eden.[2]

These are refreshing experiences in times when things are likely to be regarded as more important than people. Lloyd Paul Stryker's book is likewise refreshing, and for much the same reasons. It is a plea for the human equation, and the two lawyers mentioned above furnish further graphic illustrations of its text.

This is not one of the how-to-do-it books, although much practical experience is incorporated. Rather, the effort is in the direction of affording insight into the inner man of the advocate, and the effort is successful to a striking degree.

Beginning with the arrival of a new case, Mr. Stryker takes us through the exhaustive search of facts and precedent, portraying the relation of attorney and client at its most intimate and most effective. The opening address, cross-examination and the closing speech receive attention in turn, as the high points of advocacy. All are aptly and graphically illustrated.

Then, having painted the picture of the possible, the author turns to the dismal realities. Advocacy, he says, has fallen into neglect and presently occupies a low estate, abandoned by the law schools. For what reasons? Perhaps the cheap bombast of Fourth of July orations or the disappearance of the classical education. Interposition of public address systems between speaker and audience must bear its share of responsibility, together with radio and ghost-writing. Returning to the original theme, what can be done in the way of effective advocacy is illustrated by Rufus Choate, Abraham Lincoln, Cicero, Daniel Webster, Robert Jackson. To the list let us add Lloyd Paul Stryker.

In the field of criminal law, all that stands between the accused and an overly ambitious and unduly scrupulous prosecutor, abetted by a hanging judge, is his counsel. The case of Bertram Campbell is explored as an example of convicting the innocent. Where are the John Adamses, fearlessly defending the unpopular cause and the hated accused? Liberty depends upon the advocate who is unafraid and knows how to stand his ground. And appellate advocacy is as important as advocacy in the trial courts.

The solution? A divided Bar, says Mr. Stryker. Separate the lambs of office practice from the lions of advocacy, as the British have done with the solicitors and the barristers. American lawyers in court generally are amateurs compared with the British barristers. Early distrust of the specialist may have prevented the growth of a barrister class in America, and the advent of the corporation lawyer and the huge impersonal law firm may place great obstacles in its way today. Yet, says Mr. Stryker, the improvement of advocacy can come only from a division of the profession and acceptance by the law schools of responsibility for training advocates.

The suggested division of the legal profession seems to be unlikely. As regards the responsibility of the schools, more is being done than Mr. Stryker seems willing to recognize, but it is not my purpose here to rethresh all the grain which has recently been garnered on this score. Let me say only that the law schools do not know the ultimate destination of students except in a small minority of cases. As long as the legal profession in America includes such diverse beings as trial lawyers and tax experts, the law schools must attempt to accommodate both the dramatic and the unpoetic. It can be no source of surprise that the law curriculum shares with the liberal arts program, and perhaps education generally, some uncertainty as to immediacy of purpose.

But these side remarks in no way detract from Mr. Stryker's work. This is a grand and challenging book, replete with anecdote, illustration, quotation and epigram. Litigation is, after all, the ultimate frame of reference for the law, and in making the advocate the key to the picture Mr. Stryker achieves his purpose.

EDWARD W. CLEARY
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1. "The Men McCarthy Made Famous", *Life Magazine*, Volume 36, Number 20, Page 47, May 17, 1954.
2. Genesis III 9.

FREEDOM AGAINST ITSELF. *By Clarence K. Streit. New York: Harper & Brothers, 1954. $3.75. Pages 316.*

Since the publication of his book, *Union Now*, some fifteen years ago, Clarence K. Streit has ceaselessly, in season and out, advocated the formation of a union of the free countries on the North Atlantic. What he proposes is not a treaty, not a covenant, not an alliance, but a union as firmly fused as that of our own states.

In his recent book, *Freedom Against Itself*, Mr. Streit brings forward in support of this thesis further arguments based on a somewhat different approach and on the changes in the international situation that have been brought about by World War II.

He points out that the peoples of the free world, who originated the inventions that have been behind substantially all of the material progress that mankind has made within the past two centuries, have signally failed to take advantage of the one outstanding "invention" in the art of government achieved in all that time: the setting up of a federal government to handle all matters of common concern to its constituent states, with limited powers, but authorized to deal directly with every individual subject to its jurisdiction.

He argues that the material progress which the free peoples have thus achieved can be, and is being, turned against them by the forces of totalitarianism; that the frightful risks which they all face today are based in the main on the vested interest which certain individuals in high office or of great wealth in the democratic countries have in sustaining the fetish of national sovereignty; that the discarding of this fetish would strengthen the free world immeasurably by widening its markets, stimulating its trade, and effecting innumerable economies in its military expenditures; and that the time has come for the individual citizens in all those countries (whose thinking is so often far ahead of that of their own governments) to insist that this out-dated fetish be discarded and be discarded now. He stresses the centrifugal forces that would inevitably come into play in the event of another world-wide depression and quotes General Eisenhower's warning in 1952 that "as the Communist world carefully marshals its gigantic new sources of strength, the free world—crowded back on its defenses—may be led to fall into factions and prey upon itself".

Mr. Streit's style is discursive and somewhat repetitious, but he has amassed a wealth of pertinent facts and observations to support his argument. One of the best passages in his book is that in which he discusses the benefits, direct and indirect, likely to result from the calling of a convention of individual citizens from the North Atlantic democracies to consider the desirability of such a union, the principles on which it should be founded and the ways and means of bringing it about. In his Annexes he points out all too clearly the danger that West Germany's astonishing recovery may eventually lead to a new dictatorship, which might include not only Germany, but Italy and France as well.

Whether or not one is prepared (as is this reviewer), to accept Mr. Streit's thesis without reservation, *Freedom Against Itself* calls for a careful reading by everyone who is unwilling to surrender without a struggle to the growing power of totalitarianism and is capable of setting aside his preconceptions and his prejudices and weighing this far-reaching proposal in what Professor Williston used to call "the pure unclouded light of reason".

E. J. DIMOCK

New York, New York

BAR ASSOCIATION ORGANIZATION AND ACTIVITIES. *By Glenn R. Winters. Published for the Survey of the Legal Profession and The National Conference of Bar Presidents by the American Judicature Society. Baltimore: The Lord Baltimore Press. 1954. $4.00 single copy; five or more, $3.50 each; ten or more $3.00 each.*

This excellent book is timely and in my opinion indispensable reading for all bar association officers, secretaries and others who are interested in promoting the development and furthering the activities of the bar association organizations on a national, state and local level. Such a source book of material for use by bar officials has long been needed. Heretofore no such information has been readily available. Every member of the profession owes a great debt of gratitude to Glenn Winters for his extraordinary effort in assembling from every available source his material and presenting it in such a readable and interesting manner. If those for whom the book has been written will read it and profit through utilizing the gold mine of information it contains, every bar organization led by such individuals will become stronger, more aggressive and better able to discharge its responsibilities to the profession and the public.

Stronger and stronger bar organizations are needed everywhere to carry out through the organized Bar the obligations of lawyers to the public and to the profession. As to the public obligations I mention a few such as, for example, promoting the better administration of justice in the courts in both civil and criminal proceedings and in administrative tribunals; aiding in the selection of judges of the highest character and ability, assuring through establishment of legal aid and lawyer referral offices that legal services will be available to all indigent persons and to persons of moderate means at reasonable cost within their capacity to pay; improvement of legal education and ethical standards of the profession; the aggressive promotion of sound programs of American citizenship, to instill in the minds of all our people the responsibilities and duties of citizenship and a better understanding of our form of government, the United States Constitution and Bill of Rights.

As to obligations to the profes-

sion, I mention also a few examples such as stamping out the unauthorized practice of law by laymen; sponsoring adequate public relations programs to put the lawyer and his work in a true light before the public and to curb the slanderous and false portrayal of lawyers as scoundrels in television and radio programs, in the theaters or in the motion pictures, in comics, the press and other media of communication. The public should understand that lawyers are indispensable in the administration of justice and to guide the people of large and little financial means through the maze of complicated laws of our industrial age.

To achieve each of these objectives and others, this book will be of immeasurable assistance.

One of the principal weaknesses of the organized Bar in the United States is the lack of strong organization on the local level and the failure of such local Bars to be as active in co-ordinating their program with the state and national organizations as is desirable and necessary. It is not possible without united and coordinated effort on the part of all bar organizations working together for a common purpose to exert the full weight of lawyers everywhere to achieve the objectives of the organized Bar.

This book has twelve chapters each relating to a vital subject: Organization and government of bar organizations, with text of model constitution and bylaws for local bar associations; membership, finances and office management; meetings and programs; bar association publications; the Bar and legal education; service to members; legal service for all; ethics, grievances and unauthorized practices; legislative activities; promoting the administration of justice; American citizenship; and public relations.

Helpful suggestions supported by illustrations point the way for every bar association to accomplish these purposes. This handbook in the hands of the Conference of Bar Presidents should tremendously further the advancement of the interests of the profession. There can no longer be any excuse for the failure of any bar association, however small, to justify its lack of activity and progressiveness because of an inability to have available the tools to permit it to function properly.

HAROLD J. GALLAGHER
New York, New York

JUDGE MEDINA SPEAKS. *Albany: Matthew Bender and Company. 1954. $5.00. Pages 328.*

"The people of America love their judges; they honor and revere them; and they look to their judges for leadership in the improvement of the administration of justice. You may put that down as a fact."

In 1951-1952, when the Honorable Harold R. Medina was Chairman of the Section of Judicial Administration, he made a series of talks on the program of the American Bar Association and specifically of the Section. Wherever he spoke, there was standing room only, and his appearances were followed by requests for repeat performances and for copies of the talks. The Section tried, by distributing reprints, to supply the demand for the Medina talks. But this method of distribution proved inadequate to the task of satisfying the appetite of the vast audience, both lay and professional, which wanted more of Medina.

In 1953, Judge Ira W. Jayne, of Detroit, then Chairman of the Section, was inspired to inquire if a booklet could be published to bring between covers all the Medina talks concerning judicial administration. A commercial publisher was found, and a staff member of the Section, Mrs. Maxine Boord Virtue, was instructed to collect and edit the material and arrange for its publication under Section sponsorship. Judge Medina, with characteristic generosity, has assigned the royalties from the sale of this volume to the American Bar Association to aid in its program to improve judicial administration.

At first, we in the Section thought of the venture as a means of dispensing information about judicial administration in an unusually readable, even inspiring, form. When the book-building got under way, however, we struck more high-grade ore. During the last two decades, Judge Medina has been busily writing pieces on a wide variety of subjects, bringing to all of them his vitality, eloquence and that mixture of realism and idealism which is one of his distinguishing characteristics. Although other publishers were interested, our author has preferred that the American Bar Association have the benefit of all his addresses. The result is that the editor was given *carte blanche* to assemble a full-length volume of the judge's writings, which it is now the privilege of the Section to present.

In addition to the material on judicial administration, therefore, the reader will find himself joining in a high-spirited discussion of baseball, high school curricula, free speech, religion, the humanities, Princeton, the motion picture industry, the practice of medicine or engineering, how to make and market chicken soup, and the cable cars in San Francisco. In a final section, the editor has set forth the highlights of the extraordinary flood of correspondence received by Judge Medina at the close of the Communist trial. These letters are a unique and awe-inspiring testimony to the devotion of the American public to the ideal of due process, and their deep devotion to a man who has, under great stress, lived up to that ideal.

This is an entertaining book, an instructive book and a charming book. It is also a great patriotic document. I will not attempt to quote from it, for once that is begun, there is no stopping. (One of the publisher's employees, having reluctantly taken two galleys home to work out publicity, was so fascinated that he went back to New York the same evening to pick up a full set of galleys, and stayed up most of the night to read them.) The book will speak for itself. One morsel to suggest the feast:

. . . there is one little idea I would like to leave with you. I hate to be a hypocrite or to have my motives misunderstood. . . . If anyone tells you that I made a sacrifice going on the bench, you will know that he is talking through his hat. I made no sacrifice whatsoever. I am doing just what I always wanted to do and I am having a wonderful time. . . . I always wanted to be a judge; and I'm going to stick to the job . . . the rest of my life, or at least as long as I can behave myself, according to the terms of my commission.

In his foreword to *Judge Medina Speaks,* Judge Jayne includes a paragraph which will serve also as a fitting conclusion to this review:

> In presenting these addresses dealing with the judge's job, we are not motivated by a desire to exploit Judge Medina's "good press" and hypnotic audience appeal as propaganda for all judges. It is rather our thought that the important things he has to say should be shared with more people than those who were able to hear or read them last year. But we are not unmindful of the fact that his example ought to renew the determination of all his brother judges to lead court reform and to give their full share of public service on and off the bench.

ARTHUR F. LEDERLE
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Detroit, Michigan

TAXATION IN THE UNITED STATES. *By Randolph E. Paul. Boston: Little, Brown & Co., 1954. $15. Pages xii, 830.*

The author of this book writes from wide experience—first in representing taxpayers for many years, then as General Counsel of the Treasury during a vital period under President Franklin D. Roosevelt and Secretary Morgenthau, and after that back in private practice. Other books that he has written, dealing with the application of existing tax laws to complicated practical situations, are justly recognized as exceptionally able.

An interesting chapter deals with the discussions which have occurred over a period of some 200 years among the ablest economists and philosophers in the field of government, as to proposals to levy taxes at progressively graduated rates—the "tax bracket" idea.

This massive volume is largely devoted, however, to well-chosen extracts from what has been publicly said, during the past two generations, on each side of many important issues as to tax levies, as such issues were raised by proposed legislation from time to time and fought out as political issues are. There was, for instance, the early and bitterly contested issue between those who favored an income tax—at 2 per cent —and those who opposed the very idea of income taxation. That disposed of, there ensued issues as to higher and higher rates, as to rate-systems which are graduated according to "brackets", as to the imposition of excess profits taxes and as to discontinuance of such taxes after being in effect for a while, as to taxes designed to break up or discourage accumulations of wealth, and as to pay-as-you-go income taxation,—as well as many other points of dispute. The words written and uttered in such heated contests are here quoted from congressional debates, from statements by public officers, from newspaper editorials, and from arguments made in court. In retrospect those quotations do not reflect much credit on either side when judged by logical standards; the disputants relied heavily on attacking the motives of adversaries and on irrelevant considerations tending to arouse emotion. The kind of argument that sticks to the issue and stands on its own feet is not typical of these wordy battles.

Logical or not, arguments of the wide-ranging, hit-and-run type certainly have an effect on public opinion in legislative controversies, as in other matters which voters must decide. The vivid accounts in this book of many such tax controversies help to educate the reader in the politics of taxation—a necessary branch of knowledge.

The reader can hardly fail to ask himself the question: Why hasn't our revenue system gone to pot before this if its development has depended on such loose thinking? There are two main reasons why it has not. One reason is that in these tugs-of-war there has been power on both of two opposing sides; nothing has gone by default. On one side, as the various issues have arisen, have been those seeking to keep tax burdens down and those believing that a really free use of the revenue laws for nonrevenue purposes is dangerous to the revenues. On the other side have been those less sensitive to tax burdens and those favoring a taxing system designed to shape the social and economic form of the country. Mr. Paul shows at many points his lack of sympathy for the former of these two sides.

Conflict between these two power-sources has helped to save us from worse tax legislation than we have had.

There is another important reason why loose and partisan arguments have done us somewhat less harm than might have been expected. It concerns vital features of our legislative system to which this book gives almost no attention—the Ways and Means Committee of the House, the Finance Committee of the Senate and the Joint Committee on Internal Revenue. These committees and members of their staffs are constantly seeking to judge the trend of public opinion and to evaluate the suggestions which come to them in informal conferences with representatives of the Treasury Department and with members of the public. A proposal made to the highly qualified staff of the Joint Committee on Internal Revenue and approved by a fair preponderance of the members of these committees has a good chance of enactment, whatever may be said in public debate either for or against. This is because those members of Congress who are busy with heavy responsibilities outside the taxation field tend to discount the arguments of extremists and to rely rather heavily on the work and judgment of these committees—and, particularly, on the judgment of certain of the committee members who gain a reputation for being well-informed, both as regards

actual public opinion and the feasibility of measures that are proposed.

A further question arises as to how the author arrives at his stated conviction—not justified, as this reviewer believes—that experts in taxation have failed in their duty as citizens, and have been "uninterested in the welfare of the country as a whole". Certainly Congress disagrees with this conclusion, as shown by its frequent acceptance of recommendations contributing to the workability of the tax laws, and by the forthright acknowledgment, by leading members, of the help derived from the hard work which has produced such recommendations.[1] Among the organizations rendering very substantial aid—continuously over many years—have been the American Law Institute, the American Bar Association and its Taxation Section, and the American Institute of Accountants. It is not surprising that as to measures and issues which are outside their special competence taxation experts do not always take a strong part; if, as Mr. Paul says, tax legislation is a struggle between classes, it must be remembered that the political skill needed in class struggles does not necessarily belong to those who are experts in the detailed effects of the tax laws.

To a considerable number of readers, Mr. Paul's comments—vivid and skillfully written as they are—will seem rather one-sided, but even readers whose slant is different from his on some of the fundamental aspects will find here by far the most informative history that is available to students of our taxation system.

ROBERT N. MILLER

Washington, D. C.

1. Thus when Daniel A. Reed, now Chairman of the Ways and Means Committee, introduced in 1951 the so-called American Bar Association Bill H. R. 4775 "representing the accumulated recommendations of many years" of the Association, he prefaced his detailed analysis of its many provisions as follows: "The tax section of the American Bar Association deserves the highest praise for its constructive work in this field. These distinguished lawyers have devoted themselves unselfishly to this task, not in the interest of their clients but in the general public interest of making our tax laws equitable in their application and better in their administration." (97 Cong. Record (July 16, 1951) A-4407.) The work of other groups has been similarly recognized.

FREEDOM, LOYALTY, DISSENT. *By Henry Steele Commager. New York: Oxford University Press. 1954. $3.50. Pages ix, 155.*

> "I sometimes think that when folks talk about things they've begun to lose them already," says Stark Young's Hugh McGehee to his son after an evening of Southern rodomontade. It would be an exaggeration to say that we have begun to lose liberty in America, but it is sobering that there should be so much talk about it, just as it is sobering that there should be so much talk about Americanism and about loyalty. It was a happier time when these things could be taken for granted instead of being soiled and worn by every sunshine patriot eager for cheap applause. [Page 72.]

Most people will delight in this book as they will delight in the brave, strong mind of Professor Commager himself who is a liberal and a gentleman of the old school. And quite justly and with great power of thought and natural superiority in the use of words, he presents the case for maintaining our freedoms in this country in spite of our necessity for closing ranks both within our own people and against foreign conquest. But he does not talk about our real need of protecting our country where liberty is possible against the clearly intended world conquest of a combination of nations perhaps more powerful than ours, that is determined to conquer us by conquest both by subversive means from within and ultimate war from without.

How pleasant it would be to join Commager in all his chivalrous defense of the freedoms for their own sake. How pleasant it is at least to condemn any needless intrusion upon private rights by legislative or judicial bodies. But we cannot afford to stop here. And may we not say in partial defense that when there is unpleasant work to do, a gentleman does it himself? He does not leave it to others. The Greek city-states didn't like the infiltration of Philip of Macedon which subverted their liberties. They wanted to go on living their amazing, civilized lives with the freest discussion in philosophy, art, law and politics. But by these means Philip did prevent them from uniting and from making adequate military preparation. When the city-states later saw their own danger and their weakness when they had refused to see these obvious things before, they then half-redeemed themselves by defying Philip in their weakness and reversing their own folly. But it was too late. Philip defeated them on the battlefield and conquered all of Greece. Moreover, most cruel tragedy of all that so many refuse even to mention although it is before their eyes: For more than two thousand years, at least, the slavery Philip imposed was substantially permanent servitude. Greece never did regain her freedom. Greece was an example of her own fiery definition of tragedy itself. Absolute tragedy in the sense of complete and final failure.

The Romans didn't have to meet outward conquest in the form of tyranny. They gave up their own freedom roughly in exchange for peace, and soon after Augustus they endured such meticulous domination and cruelty as has perhaps never existed outside of Oriental countries. As a mere whim, the later emperors might send a private message to leading citizens of spotless character and loyalty decreeing their death by the following morning without any trial or even administrative formalities. The leading citizen in his turn would say lightly and casually that his life was always at the service of his emperor and, cutting the veins in his wrist, that he wouldn't think of delaying his action until the following morning.

> Thy Rome died many deaths. Her native power
> By slow diseases, such as nations know
> When liberty is lost, became a show
> And pageantry for slaves. . . .

Mr. Commager says "That government which most scrupulously protects and encourages complete freedom of thought, expression, communication, investigation, criticism is the one which has the best chance of achieving security and progress" (page 91). With one half the world bent on conquest of the other half,

is this statement entirely adequate? Like it or not, we must stand up against aggression whether by subversion within or war without. Where are the gallantries of all the freedoms if the government that protects these freedoms is itself destroyed?

PAUL SAYRE
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THE MYTH OF THE GOOD AND BAD NATIONS. *By René A. Wormser, with foreword by Raymond Moley. New York: Henry Regnery Co. 1954. $3.00. Pages 174.*

In view of the world situation and the momentous problems facing this country in its dealings with the other nations of the world, this volume is indeed timely, and a reading of it will provide very valuable background material for use in evaluating the decisions now being made. It is a relatively small book (174 pages) and few books contain so much information in so few pages.

The author's thesis is stated at the outset as follows: "We have failed miserably in our efforts to influence other nations; but we are masters at deluding ourselves. . . . I believe the gravest of these delusions to have been our devotion to the theory that there are nations which are good and other nations which are bad. It is through adherence to this theory that our foreign policy has faltered and failed from 1914 to date."

The book concludes as follows: "There are evil governments and evil leaders. There are no evil peoples, no evil nations. Nor can we afford to be led astray by the concept that any government has the essential and changeless quality of goodness."

The material that is forcefully set forth in the intervening 170 pages is almost certain to convince the reader that the thesis has been fully supported and the conclusion definitely established by the facts of history. The author's heat of advocacy may lead some readers to feel that in a number of instances he claims too much for the evidence upon which he relies, but even making allowances in such instances, the evidence is shown to be overwhelming in support of the thesis and to prove the conclusion.

The author reviews the conduct of the nations of the earth from the time of Charlemagne in 800 to the present, and demonstrates the repeated instances where evil governments have enforced unjust terms of peace which has in each instance inevitably led to future wars, with particular emphasis upon the terms imposed by the victors at the end of World War I which made World War II inevitable and those imposed at the end of World War II which would seem to make World War III inevitable. To some it may appear that the book lacks balance in that the evidence of the evil governments of practically every nation, including the United States, is overemphasized and that evidence of what constitutes good governments is practically disregarded. Some may also feel that the suggested remedies are inadequate to provide a just and lasting peace.

It is clearly demonstrated that it was a mistake to consider our enemies in World War I, principally Germany and Austria, to be evil nations that should be rendered impotent for all time and that our allies, particularly Italy and Japan, were good nations and would remain good for all time. Similarly, it was a mistake at the end of World War II to treat our enemies, particularly Germany, Italy and Japan, as bad nations that should be rendered impotent for all time and that our allies, particularly Russia, would be good nations in whom we could put our trust indefinitely. History has certainly demonstrated that the events following World War I and World War II conclusively show that merely because a nation is our adversary in war does not mean it is evil and by the same token, that merely because a nation is our ally it is necessarily good. The evil is in the government, not the nation, and the good of a nation is manifested or expressed by the type of government that is in power. Any reader will be convinced of this truth, or more properly, reminded of it, when consideration is given to the evidence presented.

The suggested remedy is the restoration of an adequate balance of power which includes an alliance and a rearming of Germany, Japan, and Italy as an immediate objective along with other alliances among the free nations in the cold war with Russia and China as long as these two countries have the type of Communist government now in power. More remote objectives include methods of correcting the tragic mistakes that were made at the close of World War I and World War II in the oppressive, vindictive and unjust terms imposed upon our defeated enemies. Obviously, in so small a volume elaboration of the suggested objectives to form the basis for a just and lasting peace can only be dealt with in general terms. While they may seem to be inadequate to many, they should provide food for thought for every reader and now is the time that much thought should be given to questions that this author forcefully presents.

FREDERIC M. MILLER
Des Moines, Iowa

PARDON AND AMNESTY UNDER LINCOLN AND JOHNSON. *By Jonathan Truman Dorris. Chapel Hill: University of North Carolina Press. 1954. $7.50. Pages 459.*

At the end of the Civil War, the people of the South found themselves entirely at the mercy of those from whom they desired to be entirely separated. Many of the authorities in Washington, at the outset regarded them as "rebels" and "traitors". Just what was their criminal status? What punishment should be meted out to those guilty of rebellion?

Arrests, indictments and imprisonment by civil and military authorities in the early days were numerous. The Federal Government often found it difficult to differentiate between its friends and enemies. The supporters of disunion appeared to be everywhere—in legislative halls, in judicial tribunals, in executive councils and in the Army and Navy.

Soon after the close of hostilities, the President of the Confederacy and many of his chief civil officers, including governors of Confederate states, were in prison awaiting the disposition of the Federal Government. Others who were not in confinement were in voluntary exile. The military leaders were more fortunate, since they enjoyed parole and consequently were not subject to arrest and imprisonment.

Lincoln's liberal attitude towards the South and its leaders is well known. He was constantly studying the military situation to make sure that any offer of amnesty and pardon would be timed right and appear when it would materially weaken the enemy. It had to be timed "to have it accepted in the true understanding rather than as a confession of weakness and fear".

He expected, at the time of proclaiming such clemency, to announce a plan for the restoration of the seceded states. Amnesty was to be the basis for reconstruction.

Lincoln's proclamation, which accompanied his message to Congress on December 8, 1863, offered pardon, with certain exceptions, to those engaged in the rebellion, and outlined a plan by which the seceded states could be restored to the Union. It was his desire that even the leaders of the Confederacy should be treated with clemency. As he put it: "Enough lives have been sacrificed; we must extinguish our resentments if we expect harmony and union."

The day after Lincoln's death, a delegation of Radicals in Congress called upon the new President. They were evidently well pleased with the change of presidents, for Senator Wade, their spokesman, who had bitterly opposed Linclon's amnesty policy and plan of reconstruction, said: "Johnson, we have faith in you. By the gods, there will be no trouble now in running the government." They expected that Andrew Johnson would be an "avenging" president and would make treason odious.

During the war, Johnson had advocated a punitive and retributive policy in dealing with persons who had supported the Confederacy. From the earliest days of secession, he had evinced a desire to have at least the leaders of the rebellion punished. Tennessee had disowned and persecuted Johnson during the early days of the war, but in 1862 that state had felt his rigorous administration as military governor. When he came to administer Lincoln's plan of reconstruction, he insisted on applying a more stringent oath of allegiance than the President had provided—an oath that permitted only those who had stood unswervingly by the Union to participate in any program of reconstruction.

The new President had declared his determination to punish the leaders of the Confederacy, and many persons who approved his policy had hailed his accession to the presidency as an act of Providence. It appeared as if his administration would quickly bring to justice a considerable number of secessionists. The rapidity with which some Southerners sought exile at the close of hostilities is evidence that they, too, feared punishment. And well they might, for numerous arrests and imprisonments seemed to indicate the President's intention to carry out his threats to make "treason odious."

How far Johnson intended to go in avenging the attack on the Union was defined in his proclamation of May 29, 1865. His fourteen exceptions included all who, the Radicals believed, should make retribution for supporting the Confederacy. His refusal to stay the execution of Mrs. Surratt augmented the fear of many of those whom he had excepted in his amnesty.

A combination of circumstances operated to turn Johnson to a course of leniency in his dealings with the South. Perhaps the first and most significant influence was Lincoln's clemency, which, in a sense, became the new President's heritage. President Johnson could hardly avoid adopting, in the main, his predecessor's program of reconstruction. Lincoln's apparent willingness to pardon anyone who properly applied for clemency was incorporated in Johnson's proclamation. This mitigating proviso soon caused the measure to lose its severity and Johnson became eventually as lenient as Lincoln had been.

Probably the new President's most significant inheritance from his predecessor was the Secretary of State, William H. Seward, whose disposition was a determining factor in Johnson's administration. Seward had learned much in his association with Lincoln and was now able to temper the avenging zeal of his new chief with something of the spirit of clemency so characteristic of the late President. Fortunately, the harmony and confidence which had developed between Lincoln and Seward were soon manifested between Johnson and Seward, and the persuasive Secretary very early influenced the President to adopt a milder course in dealing with the Confederates.

A third factor in diverting Johnson from his original intention of dealing harshly with the Confederates was the compliant spirit of most of their leaders. Their apparent willingness to abide by the consequences of their defeat could hardly help affecting anyone of intelligence.

Professor Dorris has treated his subject fully and well. In tracing clemency, amnesties and pardon from the inception of the war to 1898, when the Congress of the United States removed the last disabilities on the supporters of the Confederacy, in covering congressional amnesty, as well as that of the two Presidents, and in the courts, the author has supplied a book that was long needed in the field of Lincolniana.

The book is well-documented. The bibliography and index at the back of the book are excellent and enable the reader to quickly find any particular subject that is treated and in which he might be interested.

It is a volume that belongs in every library of Lincolniana, or which deals with the period of reconstruction.

HARRY G. HERSHENSON
Superior Court of Cook County
Chicago, Illinois

Review of Recent Supreme Court Decisions

George Rossman
Editor-in-Charge

ALIENS

Deportability of Alien Ex-Communist

■ *Galvan* v. *Press*, 347 U. S. 522 98 L. ed. (Advance p. 611), 64 S. Ct. 737, 22 U. S. Law Week 4257. (No. 407, decided May 24, 1954) *Judgment of the Court of Appeals for the Ninth Circuit affirmed.*

An alien may be deported for membership in the Communist Party without proof that he knew the Party advocates the violent overthrow of the Government and even though his membership was terminated before passage of the Internal Security Act of 1950 and before there were any legal sanctions against such membership.

Petitioner was an alien of Mexican birth who first entered the United States in 1918 and had resided here since except for brief visits to Mexico. He was a member of the Communist Party from 1944 to 1946. He was ordered deported on that specific ground by a hearing officer for the Immigration and Naturalization Service. The Board of Immigration Appeals dismissed an appeal, and both the District Court and the Court of Appeals affirmed.

The opinion of the Supreme Court, written by Mr. Justice FRANKFURTER, sustained the validity of the Internal Security Act of 1950 against petitioner's allegations that the act was unconstitutional as applied to him.

The Court refused to construe the act as providing for deportation only of those aliens who joined the Communist Party fully conscious of its advocacy of violence. While the act does not apply to "innocent dupes" of the Communists, the Court quoted Senator McCarran during passage of the law to show that it was intended to apply to "members" of the Party in the sense given by the courts and administrative agencies since 1918.

The Court met the due process argument by citing the congressional finding, expressed in the Act, that the Communist movement is a world-wide conspiracy of revolution and terrorism, and it relied upon the rule that Congress has very broad powers over the admission of aliens.

Mr. Justice REED concurred in the judgment and the opinion of the Court "except as to the deduction drawn from Senator McCarran's citation of Colyer v. Skeffington. . . ."

Mr. Justice BLACK, in a dissenting opinion joined in by Mr. Justice DOUGLAS, expressed doubt about the constitutionality of the *ex post facto* operation of the Act.

Mr. Justice DOUGLAS wrote a dissenting opinion in which Mr. Justice BLACK joined. This opinion took the position that petitioner was a *person* within the language of the Fifth Amendment entitled to its protections.

The case was argued by Harry Wolpin and A. L. Wirin for petitioner and by Oscar H. Davis for respondent.

ALIENS

Status of Filipino Who Entered United States Prior to Philippine Independence Act

■ *Barber* v. *Gonzales*, 347 U. S. 637, 98 L. ed. (Advance p. 675), 74 S. Ct. 822, 22 U. S. Law Week 4304. (No. 431, decided June 7, 1954.) *Judgment of the Court of Appeals for the Ninth Circuit affirmed.*

May a Filipino, born a national of the United States in the Philippine Islands, who entered the continental United States before passage of the Philippine Independence Act of 1934, be deported as an alien for commission of crimes involving moral turpitude? The Supreme Court here upheld the Court of Appeals for the Ninth Circuit in holding that he could not.

The Chief Justice delivered the opinion for the Court. The Government contended that the Philippine Independence Act assimilated the respondent to the status of an alien, and that he was deportable under Section 19(a) of the Immigration Act of 1917 which authorizes the deportation of aliens convicted of crimes involving moral turpitude "committed within five years after the entry of the alien". The Court reasoned that respondent had not made an "entry" into the United States within the meaning of the statute, since his arrival was as a United States national moving from one part of our insular possessions to the mainland.

Mr. Justice MINTON, joined by Mr. Justice REED and Mr. Justice BURTON, wrote an opinion dissenting on the ground that the Court was giving a strained construction to the meaning of the word *entry* to reach a result contrary to the public policy as expressed by the Congress in Section 19(a).

The case was argued by Robert

Reviews in this issue by Rowland L. Young

W. Ginnane for petitioner and by Blanch Freedman for respondent.

ANTITRUST LAW

Effect of Private Injunction on Government's Right to Injunction in Price-Fixing Case

■ *United States* v. *The Borden Company*, 347 U. S. 514, 98 L. ed. (Advance p. 601), 74 S. Ct. 703, 22 U. S. Law Week 4239. (No. 464, decided May 17, 1954.) *Judgment of the United States District Court for the Northern District of Illinois affirmed in part and case remanded in part.*

This was a civil proceeding instituted by the United States against ten Chicago dairies, charging conspiracy to monopolize the sale of fluid milk in the Chicago area in violation of the Sherman Act and price discrimination in violation of the Clayton Act.

The District Court dismissed the Sherman Act violations on the ground that the evidence failed to establish the existence of a conspiracy. The Court found that there was proof of the Clayton Act charge, but refused to issue an injunction on the ground that it was useless in view of the existence of a prior decree in a private antitrust action brought by a competitor of appellees.

Mr. Justice CLARK, speaking for the Court, affirmed dismissal of the Sherman Act charges, rejecting the Government's position that the trial judge's exclusion of certain evidence precluded the establishment of a conspiracy. The Court said that, even assuming error in the challenged rulings, admission of the evidence in question would not have established a case of conspiracy.

As for the Clayton Act violation, the Court remanded the cause, holding that the trial judge had abused his discretion in refusing to award an injunction. The prime object of allowing the Government to obtain civil decrees is to protect the public against a recurrence of antitrust violations, the Court said. To hold that a private decree renders unnecessary an injunction to which the Government is otherwise entitled is to ignore that object the Court observed. It pointed out that the private plaintiff might find it to his advantage to refrain from enforcing his injunction or might agree to a modification of the decree, again looking only to his own interest.

Mr. Justice BLACK and Mr. Justice JACKSON took no part in the consideration or decision of the case.

The case was argued by Assistant Attorney General Barnes for appellant, by Stuart S. Ball for the Borden Company and by Leo F. Tierney for the Beloit Dairy Company.

COMMERCE

Validity of State Ad Valorem Tax on Aircraft Flying Interstate

■ *Braniff Airways, Inc.* v. *Nebraska State Board of Equalization and Assessment*, 347 U. S. 590, 98 L. ed. (Advance p. 648), 74 S. Ct. 757, 22 U. S. Law Week 4263. (No. 476, decided June 1, 1954.) *Judgment of the Supreme Court of the State of Nebraska affirmed.*

Is there anything in the Constitution that prevents Nebraska from levying an apportioned ad valorem tax on the flight equipment of an interstate air carrier which is not incorporated in Nebraska and does not have its principal place of business in Nebraska? The Court upheld the tax in this case, over the argument that none of appellant's planes had acquired situs in Nebraska.

Appellant makes eighteen regularly scheduled stops daily in Nebraska. The stops are of short duration for the discharge and loading of passengers, mail, express and freight. Appellant neither owns nor maintains facilities for repairing, reconditioning or storing its flight equipment in Nebraska, but rents depot space and hires other services as required.

Mr. Justice REED delivered the opinion of the Court. The Court cited the familiar rule that the commerce power does not immunize interstate instrumentalities from local taxation but that interstate commerce may be required to pay a nondiscriminatory share of the tax burden. The Court said that there was nothing in the commerce clause to render this tax invalid, and that appellant's argument that its aircraft "never attained a taxable situs within Nebraska" was really a due process question rather than one of the commerce power. It was concluded however, that appellant's regular stops within the state were enough contact to establish Nebraska's power to tax.

Mr. Justice BLACK concurred in the result.

Mr. Justice JACKSON noted that he dissented for the reasons stated in his concurring opinion in *Northwest Airlines* v. *Minnesota*, 322 U. S. 292.

Mr. Justice DOUGLAS, concurring in the result, wrote an opinion in which he said that the question of the validity of the apportionment formula should be reserved. Appellants had not raised this point.

Mr. Justice FRANKFURTER wrote an opinion dissenting on the ground that the tie between the state and the aircraft sought to be taxed was too slight to permit the imposition of a tax.

The case was argued by William J. Hotz, Sr., for appellant and by C. C. Sheldon for appellees.

CRIMES

Confession Obtained by "Mental Coercion"

■ *Leyra* v. *Denno*, 347 U. S. 556, 98 L. ed. (Advance p. 631), 74 S. Ct. 716, 22 U. S. Law Week 4269. (No. 635, decided June 1, 1954.) *Judgment of the New York Court of Appeals reversed.*

The Supreme Court here reversed a murder conviction on the ground that it was the result of a confession obtained by mental coercion.

Petitioner was suspected of the murder of his parents. He was subjected to intensive police interrogation for several days, but refused to confess. He was finally taken by police to the funeral. During his absence, a concealed microphone was installed in the interrogation room. When he returned, the police introduced him to a "Dr. Helfand", sup-

posedly a general practitioner summoned to give petitioner medical treatment for an acute attack of sinus. Dr. Helfand in reality was a psychiatrist with considerable knowledge of hypnosis. Instead of treating petitioner's sinus, he continued the interrogation, assuring petitioner time and again that he wanted to help, how much better it would be for him to confess and how much better he would feel if he made a clean breast of the crimes. Petitioner finally confessed. He repeated the confession a few hours later to the police and again to his business partner.

Petitioner was tried and convicted of the murders. The New York Court of Appeals reversed this conviction on the ground that it rested on mental coercion. Petitioner was retried, and at the second trial the voluntariness of the confessions to the police and the business partner were submitted to the jury as a question of fact. The confession to the psychiatrist was excluded. The jury convicted and the state Court of Appeals affirmed.

The judgment was reversed by the Supreme Court speaking through Mr. Justice BLACK. The Court declared that the later confessions were simply parts of a continuous process of coercion. The Court pointed out that all the confessions were extracted "in the same place within a period of about five hours as the climax of days and nights of intermittent, intensive police questioning", and that the use of such confessions was not in accordance with due process.

Mr. Justice JACKSON took no part in the consideration or decision of the case.

Mr. Justice REED and Mr. Justice BURTON joined in a dissenting opinion written by Mr. Justice MINTON. This opinion took the position that it was not a violation of due process to leave the question of the voluntariness of the confessions to the jury.

The case was argued by Osmond K. Fraenkel for petitioner, and by William I. Siegel for respondent.

CRIMES

Validity of Federal Regulation of Lobbying Act

■ *United States* v. *Harriss*, 347 U. S. 612, 98 L. ed. (Advance p. 661), 74 S. Ct. 808, 22 U. S. Law Week 4297. (No. 32, decided June 7, 1954.) *Judgment of the United States District Court for the District of Columbia reversed.*

In this case the Court upheld the constitutionality of the Federal Regulation of Lobbying Act, 60 Stat. 812, 839, 2 U.S.C. §§ 261, 270. Appellees were charged by information with failure to report the solicitation and receipt of contributions to influence the passage of legislation which would cause a rise in the price of agricultural commodities in violation of the act. The District Court dismissed the information on the ground that the act was unconstitutional. It was argued that Sections 305, 307 and 308 of the statute were too vague and indefinite to meet the requirements of due process, that Sections 305 and 308 violated freedom of speech and the right to petition the Government, and that Section 310(b) violated the right to petition the Government.

The CHIEF JUSTICE spoke for the Court in upholding the validity of the statute. The Court found that the key section of the act was Section 307, which defines the "Persons to Whom Applicable," holding that the disclosure provisions of Sections 305 and 308 apply only to the persons described in Section 307.

Despite the broad language of the act, the Court relied upon the legislative history to determine that the activities regulated were " 'lobbying in its commonly accepted sense'—to direct communication with members of Congress on pending or proposed federal legislation." The Court set forth three prerequisites to coverage under Section 307: (1) the "person" must have solicited, collected or received contributions; (2) one of the main purposes of such person or of such contributions must have been to influence the passage or defeat of legislation; (3) the intended method of accomplishing the purpose must have been through direct communication with members of Congress. So construed, the Court ruled, the statute was sufficiently definite.

The Court found that Congress had not prohibited freedom to speak, to publish or to petition the Government, on enacting the statute, but had merely "provided for a modicum of information from those who for hire do attempt to influence legislation. . . . It only wants to know who is being hired, who is putting up the money, and how much."

The Court did not pass on the validity of the penalty provided in Section 310 (b), saying that the section had not been applied to appellees and might never be applied to them.

Mr. Justice CLARK took no part in the consideration or decision of the case.

Mr. Justice DOUGLAS, joined by Mr. Justice BLACK, wrote a dissenting opinion which took the position that the statute was so broad that it applied to anyone "who writes a letter or makes a speech or publishes an article. . ." urging passage of legislation and was an unconstitutional restraint on freedom of speech.

A dissenting opinion by Mr. Justice JACKSON declared that the act was "so mischievously vague that the Government charged with its enforcement does not understand it".

The case was argued by Oscar H. Davis for appellant and by Burton K. Wheeler for appellee.

GOVERNMENT EMPLOYEES

Federal Government Indemnity for Claims Paid Under Tort Liability Act

■ *United States* v. *Gilman*, 347 U. S. 507, 98 L. ed. (Advance p. 597), 74 S. Ct. 695, 22 U. S. Law Week 4243. (No. 449, decided May 17, 1954.) *Judgment of the United States Court of Appeals for the Ninth Circuit affirmed.*

In this case, the Court refused to grant indemnity to the Federal Government from one of its employees after it had been held liable for his tortious conduct under the Federal Tort Claims Act.

Gilman, who was driving a government automobile in the scope of his employment by the Government, had a collision with one Darnell, who sued the United States and recovered $5,500. The District Court gave judgment over for the United States in the same amount. The Court of Appeals reversed the judgment over by a divided vote.

Speaking for a unanimous Court, Mr. Justice DOUGLAS affirmed. The Court declared that the case involved a grave policy question that was for the Congress, not the courts, to decide. The opinion cited problems of discipline and morale of government employees and the financial burden on the Government raised by the rule of indemnity sought.

The case was argued by Paul A. Sweeney for petitioner and by William C. Wetherbee for respondent.

LABOR LAW

State Tort Action for Unfair Labor Practice

■ *United Construction Workers* v. *Laburnum Construction Corporation*, 347 U. S. 656, 98 L. ed. (Advance p. 686), 74 S. Ct. 833, 22 U. S. Law Week 4289. (No. 188, decided June 7, 1954.) *Judgment of the Supreme Court of Appeals of the Commonwealth of Virginia affirmed.*

The Labor Management Relations Act does not preclude an action for damages in a state court for tortious conduct that constitutes an unfair labor practice under the act.

This was a common-law tort action against the petitioner, an affiliate of the United Mine Workers of America, filed in the courts of Virginia to recover damages for profits lost when respondent was forced to abandon construction projects. The union had used threats and intimidation in its efforts to secure recognition as the sole bargaining agency for employees of respondent, forcing abandonment of the projects.

In an opinion by Mr. Justice BURTON, the Court ruled that the Labor Management Relations Act had not pre-empted jurisdiction so as to exclude state courts from entertaining the tort action for damages. The Court pointed out that to deny petitioner's right of recovery would amount to depriving it of its property without recourse or compensation and would, in effect, immunize petitioners from liability for their tortious conduct, since the federal statute sets up no general compensatory procedure.

Mr. Justice JACKSON took no part in the consideration or decision of the case.

A dissenting opinion by Mr. Justice DOUGLAS, in which Mr. Justice BLACK joined, argued that the tortious conduct involved here was the very type of conduct with which the federal act specifically deals and that the parties have only the federal remedy, Congress having pre-empted the field for the N.L.R.B. in the interests of peaceful, orderly settlement of labor disputes.

The case was argued by M. E. Boiarsky for petitioners and by Archibald G. Robertson and George E. Allen for respondent.

LABOR LAW

Validity of Administrative Regulations Under Defense Production Act

■ *Allen* v. *Grand Central Aircraft Company*, 347 U. S. 535, 98 L. ed. (Advance p. 619), 74 S. Ct. 745, 22 U. S. Law Week 4251. (No. 450, decided May 24, 1954.) *Judgment of the United States District Court for the Northern District of California reversed.*

This case was a challenge to the President's authority to appoint an enforcement commission to carry out the policies of the Defense Production Act of 1950.

Administrative proceedings were begun against appellee when the Wage Stabilization Board filed a complaint with the National Enforcement Commission, alleging that appellee had granted wage increases in violation of an order freezing wages at the levels of January 25, 1951. Appellee secured an injunction from the district court against further conduct of the administrative proceeding on the ground that it would suffer irreparable damage by the weakening of its bank credit and deprivation of essential working capital. The appellee also contended that the Defense Production Act vested enforcement in the district courts and did not authorize the administrative proceedings.

Mr. Justice BURTON, for a unanimous Court, reversed. The Court expressed doubt about appellee's right to test the validity of the administrative procedure before exhausting it, but ruled that a litigant could not enjoin such proceedings merely because they might jeopardize bank credit or otherwise be inconvenient or embarrassing.

As for the central question, the President's right to apply administrative action to enforce the wage stabilization proceedings, the Court upheld the right, basing its conclusions upon a comparison of the Defense Production Act of 1950 and the Stabilization Act of 1942. The Court declared that the similarity of the acts, both in language and purpose, indicated that Congress intended to set up enforcement provisions similar to those of the 1942 statute when it enacted the Defense Production Act.

A further contention, that the substantive provisions of the Defense Production Act had expired with the removal of wage ceilings, was dismissed. The Court declared that the General Savings Statute was applicable.

The case was argued by Robert L. Stern for appellants, and by Richard W. Lund for appellees.

LABOR LAW

Power of Federal Court To Enjoin Suit in State Courts For Anti-picketing Injunction

■ *Capital Service, Inc.* v. *National Labor Relations Board*, 347 U. S. 501, 98 L. ed. (Advance p. 594), 74 S. Ct. 699, 22 U. S. Law Week 4241. (No. 398, decided May 17, 1954.) *Judgment of the Court of Appeals for the Ninth Circuit affirmed.*

In this case arising out of a labor dispute, the Court ruled that a fed-

eral court had power to issue an injunction forbidding the employer to enforce a state injunction against union picketing.

The union placed pickets at certain retail stores that handled petitioner's bakery goods following an unsuccessful attempt to organize the petitioner's employees. Petitioner obtained an injunction against the union in a California court and a few days later filed a charge of unfair labor practices with the National Labor Relations Board. The Board's Regional Director issued an unfair labor practice complaint against the union and petitioned a federal district court for an injunction restraining the union's conduct. Simultaneously the Board filed suit in the district court asking that petitioner be enjoined from enforcing the state injunction. The federal injunction was granted and the Court of Appeals affirmed.

Speaking for the Supreme Court, Mr. Justice DOUGLAS upheld the federal jurisdiction, reasoning that the district court had jurisdiction because the case was a "civil action" arising under an act of Congress "regulating commerce". While federal courts seek to avoid needless conflict with state agencies, the Court said, this was a case where Congress had vested a federal agency with exclusive authority so that the federal court might enjoin the state proceeding to preserve the federal right. The Court concluded that the district court's injunction was "necessary in aid of its jurisdiction".

Mr. Justice BLACK dissented without opinion.

Mr. Justice JACKSON took no part in the consideration or decision of the case.

The case was argued by John L. Hall, Robert Proctor and Claude R. Branch for appellant and by Ralph S. Spritzer for appellee.

OIL AND GAS

Jurisdiction of Federal Power Commission over Gathering Natural Gas

■ *Phillips Petroleum Company* v. *Wisconsin, Texas* v. *Wisconsin, Federal Power Commission* v. *Wisconsin,* 347 U. S. 672, 98 L. ed. (Advance p. 695), 74 S. Ct. 794, 22 U. S. Law Week 4281. (Nos. 280, 281 and 418, decided June 7, 1954.) *Judgment of the United States Court of Appeals for the District of Columbia Circuit affirmed.*

These cases presented a question about the jurisdiction of the Federal Power Commission over the rates charged by a natural-gas producer and gatherer.

The Phillips Petroleum Company is an oil company that also produces, gathers, processes and sells natural gas. It does not engage in the interstate transmission of gas from the fields to consumer markets, but does sell natural gas to interstate pipeline companies which do engage in such interstate transmission. After hearings, the Commission determined that Phillips was not a "natural-gas company" within the meaning of that term in the Natural Gas Act and therefore was not under the Commission's jurisdiction. The Court of Appeals reversed.

Mr. Justice MINTON, speaking for the Court, agreed with the Court of Appeals, saying that "the statutory language, the pertinent legislative history, and the past decisions of this Court all support the conclusion". Appellant argued that it was exempted by Section 1(b) of the Act, which makes it applicable to "the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale . . . but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas. . . ." The Court declared that this argument was foreclosed by the decision in *Interstate Natural Gas Co.* v. *Federal Power Commission,* 331 U. S. 682.

Mr. Justice JACKSON took no part in the consideration or decision of the cases.

Mr. Justice FRANKFURTER wrote a concurring opinion in which he declared that Congress had intended to provide for regulation in cases like these, in which the states could not constitutionally regulate.

Mr. Justice DOUGLAS, dissenting, said that for him the determinative factor was the fact that if the Commission had jurisdiction over Phillips' natural gas rates, the Commission would of necessity have to supervise all the company's producing and gathering properties, which would largely nullify the exemption granted by Congress.

Mr. Justice CLARK also wrote a dissenting opinion in which Mr. Justice BURTON joined. This opinion took the view that the clear language of the statute exempted Phillips from the Commission's jurisdiction.

The cases were argued by Hugh B. Cox for petitioner in No. 280, by Dan Moody for petitioners in No. 281, by Solicitor General Sobeloff for petitioner in No. 418. Stewart G. Honeck, William E. Torkelson, Charles S. Rhyne, Harry G. Slater and James H. Lee argued the cases for respondents.

RAILROADS

Charge for Unloading Cars by Carriers

■ *Secretary of Agriculture* v. *United States, Florida Citrus Commission* v. *United States,* 347 U. S. 645, 98 L. ed. (Advance p. 680), 74 S. Ct. 826, 22 U. S. Law Week 4294. (Nos. 480 and 481, decided June 7, 1954.) *Judgment of the United States District Court for the Southern District of Florida vacated and cause remanded to Interstate Commerce Commission.*

Five railroads that transport fruit and vegetables into New York City and Philadelphia filed schedules of charge for unloading services with the Interstate Commerce Commission. Shippers and shippers' organizations and others protested the proposed charges, contending that the unloading was an essential part of delivery.

Speaking for the Court, Mr. Justice FRANKFURTER reversed and remanded to the Commission. The Court declared that the general rule is that carriers do not unload, their responsibility ending when the goods are "delivered" by placing them in a place accessible to the consignee.

In overruling the Commission's grant of the rate schedule for unloading the cars, the Court pointed out that the situation in those cities was unusual. In New York, the cars are unloaded at pier terminals after being floated on barges across the river. The consignees were not allowed to unload the cars themselves, and the Commission had found that it would be "impracticable" for them to do so. In Philadelphia, the carriers had refused to permit consignees to do their own unloading. The Court said that these unusual circumstances made unloading by the carrier an essential part of the delivery, and hence one necessarily encompassed in the line haul.

The CHIEF JUSTICE, Mr. Justice BLACK and Mr. Justice DOUGLAS noted that they would hold the Commission's order invalid and enjoin its enforcement on the ground that the Commission had failed to determine the reasonableness of the carriers' line haul rates on the basis of increased unloading rates allowed by the Commission.

Mr. Justice JACKSON took no part in the consideration or decision of the cases.

The cases were argued by Maxwell W. W. Wells for appellants in No. 481, by Neil Brooks for appellant in No. 480, by Edward M. Reidy for appellee Interstate Commerce Commission, and by Hugh B. Cox for appellees B. & O. R.R. *et al.*

SHIPPING

Proceeding Direct Against Insurance Company for Maritime Deaths

■ *Maryland Casualty Company* v. *Cushing*, 347 U. S. 409, 98 L. ed. (Advance p. 519), 74 S. Ct. 608, 22 U. S. Law Week 4213. (No. 11, decided April 12, 1954.) *Judgment of the Court of Appeals for the Fifth Circuit vacated and remanded to the District Court.*

This was an attempt by the representatives of seamen drowned in a maritime accident in the waters of the Atchafalaya River to recover direct from the insurance companies. The plaintiffs relied upon a Louisiana statute that permits direct suit "against the insurer within the terms and limits of the policy". The owner and charterer of the vessel had filed consolidated petitions in admiralty in a federal district court to limit their liability under Sections 183 and 186 of 46 U.S.C. The District Court dismissed the suit against the insurers on the ground that by its own terms the Louisiana statute was inapplicable to policies of marine insurance and that its application would depart from the characteristics of the general maritime law. The Court of Appeals reversed.

Mr. Justice FRANKFURTER announced the decision of the Supreme Court in an opinion in which Mr. Justice REED, Mr. Justice JACKSON and Mr. Justice BURTON joined. This opinion took the position that the Louisiana statute clashed with the federal system for marshalling all claims arising from certain maritime causes of action.

Mr. Justice CLARK, in a concurring opinion, saw no necessity for holding the Louisiana statute invalid, declaring that it was not necessarily in conflict with the federal policy of limiting liability. If the limitation proceeding were ended first, he argued, and the owner's liability settled, the question of whether claimants could proceed directly against the insurance companies was purely a question of Louisiana law.

In a dissenting opinion written by Mr. Justice BLACK, in which the CHIEF JUSTICE, Mr. Justice DOUGLAS and Mr. Justice MINTON joined, it was argued that there was nothing in the Limited Liability Act that forbade recovery under the Louisiana statute.

The case was argued by Eberhard P. Deutsch for petitioners and by James J. Morrison for respondents.

Hearing Examiner Positions Open

■ The United States Civil Service Commission has announced that applications are again being accepted for the examination for filling hearing examiner positions in various federal agencies in Washington, D. C., and throughout the United States. The salaries for these positions range from $5,940 to $10,800 a year.

No written test is required. To qualify, applicants must have had at least six years of progressively responsible experience. For positions paying from $5,940 to $8,360 a year, part of the experience may have been of a general nature in legal practice or in technical work performed in a field appropriate to the field in which hearings are conducted, such as rates, finances, violations, licenses, benefits or regulations. For the higher-paying positions, all the experience must have been obtained in legal proceedings as a judge, master or referee of a court of record; as a member, officer, or employee of a governmental regulatory body; or in work which included responsibility for the preparation or presentation of cases conducted before a governmental regulatory body or a court of record. Types of cases in which applicants must have participated are described in Examining Circular, EC-17.

Those persons now on the present hearing examiner registers will be requested by the Commission to bring their experience up to date if they wish to be placed on the registers which will be established from this examination. These applicants will, of course, be rerated.

Further information and application forms may be obtained after August 10, 1954, from many post offices throughout the country or from the U. S. Civil Service Commission, Washington 25, D. C. Applications must be filed with the Commisison's Washington office and must be received or postmarked not later than September 7, 1954.

What's New in the Law

The current product of courts, departments and agencies

George Rossman • EDITOR-IN-CHARGE
Richard B. Allen • ASSISTANT

Actions . . . right of privacy

■ The publishers and motion picture producers of *From Here to Eternity* have successfully withstood an action under New York's right-of-privacy statute. The Magistrates' Court of the City of New York, Borough of Brooklyn, held that the novel's character Angelo Maggio was not based upon the plaintiff Joseph A. Maggio.

The statute makes it a misdemeanor for anyone to use the name, portrait or picture of any living person without his permission for purposes of trade or advertising.

The plaintiff served in Hawaii in the same company with the book's author, James Jones, just before World War II. While the book portrays Army life in Hawaii in the prewar period, the portrayal of the fictional Maggio did not follow the real Maggio's life or actions.

To have a violation of the statute, the Court ruled, the name must be used in such a context as to point unequivocally to and identify the complainant. In this case the names were not identical, and use of the name was coincidental, as indeed the author claimed in the usual prefatory disclaimer that "resemblance to actual persons is accidental". Too, the Court stated, the purpose of the statute is to proscribe an attempt to capitalize on the person's name. Here the complaining Maggio was, in the words of the Court, "like most of us, an obscure member of society". The Court found "well over" 100 persons named Maggio in the Brooklyn telephone book.

(*People on Complaint of Maggio* v. *Charles Scribner's Sons et al.*, Mag. Ct. N.Y.C., Brooklyn, April 29, 1954, Dunaif, C.M., 130 N.Y.S. 2d 514.)

Armed Forces . . . doctors draft law

■ A young doctor who refused a commission under the doctors draft law and was then inducted into the Army as a private has been unsuccessful in the Court of Appeals for the Fifth Circuit in a constitutional challenge of the Act.

The instant case differed from most previous judicial considerations of the doctors draft law (*e.g.*, *Orloff* v. *Willoughby*, 345 U.S. 83, and *Nelson* v. *Peckham*, 210 F. 2d. 574) in that the individual was under no security suspicion. Here the doctor was offered a commission both before and after his induction, but he declined. He sought a writ of habeas corpus, contending that the law [50 U.S.C.A. App. §454] was unconstitutional.

Passage of the Act did not constitute an excess exercise by Congress of its constitutional power to raise and support armed forces, the Court held. This power is plenary, the Court continued, and "it is not for the judiciary to review the legislative branch on the question of what military strength is necessary for the safety of the nation, nor how the forces shall be raised, nor of what elements they shall be composed". The Court also rejected the contention that equal protection was denied because the law extended only to doctors, dentists and allied specialist categories under 50. This classification, the Court ruled, satisfied requirements of equal protection. Also turned down was the argument that the law imposed involuntary servitude in violation of the Thirteenth Amendment.

Several arguments were not considered because they related to what the Court termed "the wisdom and policy of the Act". These were that the law was not really designed to draft doctors but to coerce them into entering the service, that doctors are not needed for present use in the Armed Forces, that drafted doctors are used largely to care for civilian employees and dependents of military personnel, and that there are already sufficient doctors available for service in the Army Medical Reserve Corps.

(*Bertelsen* v. *Cooney*, C.A. 5th, May 20, 1954, Strum, J.)

Constitutional Law . . . federal habeas corpus proceedings by state prisoners

■ In the face of a challenge by Pennsylvania, joined in a brief by the attorneys general of forty other states, the Court of Appeals for the Third Circuit has found constitutional the procedure by which state prisoners test in the federal courts their custody and convictions at the hands of a state.

Habeas corpus proceedings in the federal judiciary have been available since 1867 to state prisoners, after they have exhausted state remedies, under the Habeas Corpus Act [28 U.S.C.A. §2241 *et seq.*]. Disagreeing with Pennsylvania's contention, the Court felt that the constitutionality of the Act was settled by the Supreme Court's decision in 1886 in *Ex parte Royall*, 117 U.S. 241. But the Court conceded that the doctrine might be challenged again.

The full bench of the Court agreed

Editor's Note: Virtually all the material mentioned in the above digests appears in the publications of the West Publishing Company or in The United States Law Week.

that in such proceedings the federal courts did not retry the issues of fact determined in the state courts and that such proceedings were not suits against the state and thus beyond the federal judicial power.

The Court declared that the real reason for the attack by the states was the "not unnatural irritation that the review of state courts comes at the inferior federal court level". But, the Court observed, the states must realize that their battle against federal interference was lost many years ago when the Fourteenth Amendment was adopted. "That necessarily confers federal power to prevent states from doing the forbidden thing", the Court said. "If the authority of federal courts is to be more limited than that provided by the present statute, that limitation must be made by the Congress." The Court also noted that such habeas corpus proceedings had been entertained for years by federal courts without challenge.

In the instant case, however, with three judges dissenting on that feature of the case, the Court refused to disturb the district court's refusal to issue a writ of habeas corpus. The essence of the prisoner's complaint was that the state court which sentenced him had considered the report of a psychiatrist who himself was mentally ill.

(*U.S. ex rel. Elliott* v. *Hendricks*, C.A. 3d, June 2, 1954, Goodrich, J.)

Corporations . . . payment of expenses in management contest

■ In a stockholders' derivative action the New York Supreme Court Appellate Division, Second Department, has ruled that it is proper for a corporation to pay the expenses of both sides in a proxy and management control contest.

As a result of the struggle the management group was unseated. The old board of directors partly reimbursed this group and the new board paid the remaining amount. The insurgent group's expenses were paid by the new board after approval by the stockholders at a special meeting.

The Court held that expenses incurred by the old management in presenting its policies and its interpretation of the intracompany fight to the stockholders were properly charged to the corporation. The Court indicated that this rule would not apply to what it termed "needless expense" to accomplish the purpose of informing stockholders on management policy, but it found that the plaintiff had failed to segregate unwarranted and unreasonable expenses.

The Court declared that the new management's expenses in conducting its campaign for control might be reimbursed by the corporation only upon approval by the stockholders, which had been given in this case.

(*Rosenfeld* v. *Fairchild Engine and Airplane Corp.*, N.Y. S.C. App. Div., 2d Dept., May 24, 1954, Murphy, J.)

Corporations . . . stock option

■ A Delaware court has held that the holder of an unlimited stock option may exercise the option even after the corporation is in voluntary dissolution, but that the corporation may have an equitable remedy if it can show that exercise of the option would produce an inequitable or unconscionable result on the other stockholders.

In 1935 the plaintiff became the owner by assignment of an unlimited option to purchase 50,000 shares of a certain class of stock at one cent a share. There were 25,981 shares left under the option when the corporation voluntarily dissolved in 1953, and their value was $1.50 a share. The plaintiff alleged that he had advanced money for the corporation's use, but the defendant corporation countered by saying that he could have been repaid at any time had he so requested.

The Court of Chancery of Newcastle County ruled that under the option the corporation was committed to keep the offer open, and that the corporation breached its contract by dissolving, since under Delaware law trustees in dissolution cannot issue additional capital stock. The Court therefore concluded that the plaintiff's remedy would be specific performance with relief being the monetary alternative.

But the Court felt compelled to follow Delaware case law holding that stock options should be terminated if they worked an inequity to other stockholders. Since the instant case was submitted on cross-motions for summary judgments, the Court declared it did not have enough before it to determine this point and denied both motions.

(*Gamble* v. *Penn Valley Crude Oil Corp.*, Ct. Chan. Dela., New Castle, April 9, 1954, Seitz, C., 104 A. 2d 257.)

Courts . . . recusation of judge

■ The picture of a judge disqualifying himself "in all good conscience" is graphically sketched in a recent opinion of Judge Madden of the United States District Court for the District of New Jersey.

An application seeking the judge's disqualification to sit in a certain criminal case was filed under 28 U.S.C.A. §144. Essentially, bias and prejudice on the part of the judge, stemming from his activities in a former case in which one of the present defendants was also a defendant, were charged.

The Court made a careful review of the law relating to disqualification and held that the application and supporting affidavits were legally insufficient. The Court declared, however, that a judge may recuse himself, *sua sponte*, "for compelling moral reasons, or where there exists in his own mind some real doubt as to the impartiality which he, as an individual, may exert on the matter then before him as a judicial officer".

Judge Madden stated that the matters set forth in the affidavits did not in the least influence him against the particular defendant, but he said there was inherent danger in the "inevitable collation of such elements in view of a new criminal prosecution" and that this gave rise to "grave concern and misgivings with respect to the continuance of complete personal impartiality of judgment or impression, which may or could ef-

fect objectivity of judicial considerations". He therefore disqualified himself.

(*U.S.* v. *Valenti,* U.S. D.C. N.J., March 19, 1954, Madden, J., 120 F. Supp. 80.)

Criminal Law . . . new trial

■ The Court of Appeals for the Second Circuit has affirmed a district judge's refusal to grant a motion for a new trial in a case where the Government's star witness recanted his testimony and then repudiated his recantation.

The defendant was convicted by a jury of selling marihuana cigarettes, the chief testimony being furnished by a "special employee" of the Bureau of Narcotics. After the trial this witness made an affidavit recanting his testimony, and the defendant's attorney filed a motion for a new trial. Later the witness repudiated his recantation, and the district judge, although saying he thought the witness "completely irresponsible", denied the motion because of what he perceived to be the rule of law that in order to grant the motion he must be "reasonably well satisfied that the testimony given by the witness was false".

The Court affirmed this decision and ruled that the court below had applied the correct rule. But one judge dissented on the ground that there was no such "rule of law" as the district judge thought. The dissenter declared that the judge could grant a motion for a new trial if he had any serious doubts about the credibility of a major witness, and that such an order was reviewable only for abuse of discretion.

(*U.S.* v. *Troche,* C.A. 2d, May 26, 1954, Swan, J.)

Criminal Law . . . self-incrimination

■ Although the United States Court of Military Appeals has continued to spell out its rule that requiring an accused involuntarily to furnish specimens of his handwriting violates the right against self-incrimination provided in the Uniform Code of Military Justice, it has refused to invalidate a conviction when there were other samples of the accused's handwriting before the court martial.

The accused's confession, signed in eight places, had been received in evidence. The accused then took the witness stand and, although conceding the confession was made voluntarily, maintained that FBI agents had "talked me into making it". Later the accused was required to write his name five times for the purpose of comparing it with signatures on pawn tickets.

The Court condemned this procedure as a violation of the accused's privilege against self-incrimination because the accused was required to participate actively in supplying evidence against himself. In this respect the Court was following its recent decisions in *U.S.* v. *Eggers,* 3 U.S. C.M.A. 191 (39 A.B.A.J. 1097; December, 1953), and *U.S.* v. *Greer,* 3 U.S.C.M.A. 576 (40 A.B.A.J. 326; April, 1954).

But, the Court reasoned with one judge dissenting, since the court martial already had before it the eight specimens of handwriting on the confession it would be a "triumph of doctrine over utility" to reverse the conviction. "That the accused would be in any way the better protected through a confrontation of this lesser number of signatures is difficult to conceive", it observed.

(*U.S.* v. *Morris,* U.S. Ct. Mil. App., April 30, 1954, Brosman, J., 4 U.S. C.M.A. 209.)

Government Employees . . . discharge on loyalty grounds

■ The right of federal governmental agencies to reopen loyalty-ground discharge proceedings against employees after the establishment of new standards by the President has been affirmed by the Court of Appeals for the District of Columbia Circuit.

By Executive Order No. 9835, promulgated in 1947, the standard for discharge of employees on loyalty grounds was whether "reasonable grounds exist for belief that the person involved is disloyal". Under this standard the Post Office Department attempted to discharge an employee, but the Loyalty Review Board of the Civil Service Commission recommended reinstatement and the Postmaster General concurred.

By Executive Order No. 10241, issued in 1951, the standard was altered to read whether "there is a reasonable doubt as to the loyalty of the person involved". The Loyalty Review Board by memorandum then ordered all agencies to readjudicate loyalty cases under the new standard. This was done and the employee was discharged from the postal service.

In affirming the action of the district court dismissing the aggrieved employee's complaint, the Court held that the principle of *res adjudicata* does not apply to administrative proceedings and that he was not entitled to a declaratory judgment and injunctive relief.

But, moreover, the Court ruled, the two executive orders presented markedly different loyalty standards. Under the former order the ultimate fact subject to inquiry, the Court declared, was disloyalty, while under the latter order the ultimate fact was loyalty. "The amended standard applied a more rigid test of suitability for government employment", the Court observed. "It contemplated the possible existence of proof or information which, while not capable of inducing a belief that the person 'is disloyal,' does cause a reasonable doubt as to whether he is in fact loyal."

The Court further held that the President had an undoubted right to determine the standards to be met for employment in the Federal Government and that the Loyalty Review Board was within its authority in issuing the order to reopen loyalty cases decided against the government under the old standard.

One judge dissented, objecting that the reopening of the case was not based upon the executive order itself but upon the Loyalty Review Board's memorandum. He declared that nothing less than express language in the executive order could have authorized the procedure in

the instant case, since such repeated investigations "shock the sense of justice and the sense of security of other persons in and out of government. . . ."

(Jason v. *Summerfield et al,* C.A. D.C., June 10, 1954, Danaher, J.)

Husband and Wife . . . action for injury to other

■ Affirming a summary judgment for the defendant, the Supreme Court of Arizona has held that a wife and child do not have actions separate and apart from that of the husband-father for the ordinary negligence of a third person resulting in personal injuries to the husband-father.

The husband had maintained a common law action against his employer based on negligence, but failed on a defendant's directed verdict. Thereafter the wife and child brought the instant action against the employer based on the same alleged negligence.

The Court rejected what it termed the plaintiffs' novel claim that they had separate actions based on the injury to the husband and father. There never was and is now no such action at common law, the Court ruled. Actions by a wife against one who furnishes her drug-addicted husband with drugs or her drunkard husband with liquor, which are maintainable at common law, are not analogous to a similar action based on ordinary negligence, the Court declared.

The Court did concede that in *Hitaffer* v. *Argonne Co.,* 183 F. 2d 811, the United States Court of Appeals for the District of Columbia Circuit sustained a plaintiff-wife's right to a separate action, but it refused to go along with a holding which it said attempted "to remake the common law".

(Jeune v. *Del E. Webb Construction Co.,* Sup. Ct. Ariz., April 26, 1954, Windes, J., 269 P. 2d 723.)

Negligence . . . contributory negligence of child

■ A New York court has held that it was error to instruct a jury that a plaintiff 9 years old at the time of his injury could not recover if the jury found that he was struck after darting into the street between parked cars.

The Supreme Court's Appellate Division, First Department, ruled that this instruction amounted to saying that a 9-year-old infant was guilty of contributory negligence as a matter of law for running into the street while playing. The Court declared that in such cases the jury must be allowed to determine from the child's mental capacity and maturity whether he is capable of and indeed guilty of contributory negligence.

One judge dissented, saying that any New York City child should know the dangers of running into the street between parked cars without looking. There could be no jury question, he contended unless some question of the child's normality was raised.

(Ramirez v. *Perlman,* N.Y. S. Ct. App. Div., 1st Dept., May 11, 1954, Callahan, J., 130 N.Y.S. 2d 398.)

Prisons and Prisoners . . . restrictions

■ A would-be inventor incarcerated in the Illinois State Penitentiary will have to wait until he completes his 100-year sentence before he will be in a position to apply for patents on his inventions. This is the apparent effect of a decision of the Court of Appeals for the Seventh Circuit affirming the dismissal of a suit under the Civil Rights Act [42 U.S.C.A. §1981 *et seq.*] in which the prisoner sought an injunction and damages against the warden.

The prisoner complained that the warden would not allow him "to draw inventions", "to register inventions" in the Patent Office or "to consign his inventions to manufacturers". It was also alleged that the warden claimed as state property some oil paintings the prisoner had done during his term.

The Court held that federal courts do not have the power to control or regulate the ordinary internal management and discipline of state prisons. And, moreover, the Court declared, prison officials have wide discretion in imposing restraints on prisoners, such as censorship of newspapers and mail received, and the carrying on of a business.

Too, the Court noted, the prisoner in this case had filed a similar complaint in the same court a few months before and no appeal had been taken from an order dismissing it. "Courts are not required to repeatedly determine the same questions and same issues between the same parties", it said.

(U.S. ex rel. *Wagner* v. *Ragen,* C.A. 7th, May 21, 1954, Swaim, J.)

Schools . . . claim of privilege against self-incrimination

■ New York City school teachers cannot claim a privilege under the Fifth Amendment to refuse to answer the question whether they are or ever have been a member of the Communist Party and still continue to teach in the state's schools. This is the decision of the Court of Appeals of New York in a case involving several public school and college teachers who refused to answer the question when called before a one-man congressional subcommittee.

The case turned largely upon construction of §903 of the New York City Charter, which provides, insofar as it is applicable to the instant case, that any employee of the city who shall refuse to answer before any legislative committee any question "regarding the property, government or affairs of the city . . . on the ground that his answer would tend to incriminate him" shall automatically be separated from his employment.

The Court held that it was clear that teachers may be employed under reasonable terms laid down by proper authorities and that the charter provision provided for an automatic resignation upon claiming the privilege. The Court also ruled that an inquiry into past or present membership in the Communist Party is an inquiry involving official conduct under §903, that teachers are city employees so as to make the section applicable, and that a one-man con-

gressional subcommittee was "any legislative committee" within the meaning of the code provision.

Three judges dissented on the ground that §903 was not applicable because the teachers involved were not employees of the City of New York and that the congressional subcommittee was not a qualified investigating group of the city's affairs.

(Daniman v. *Board of Education,* C.A. N.Y., April 22, 1954, Conway, J., 119 N.E. 2d 377.)

Trials . . . exclusion of public and press

■ The conviction of Minot F. Jelke of compulsory prostitution has been reversed by the New York Supreme Court's Appellate Division, First Department, with two judges dissenting, on the ground that the defendant was denied a fair and impartial trial because the trial judge excluded the public and press during the state's case. Although the Court stated that there was sufficient evidence to sustain the verdict, it ruled that the conviction could not stand because one of the fundamentals of a fair trial had not been respected.

The constitutions of forty-one states require all criminal trials to be open to the public. The Sixth Amendment of the United States Constitution provides that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial. . . ." New York has no comparable constitutional guarantee, but provides by statute: "The sittings of every court within this state shall be public, and every citizen may freely attend the same . . .", but goes on to provide that the trial judge may exclude "persons who are not directly interested" from cases involving several crimes, including seduction and sodomy.

The trial court excluded the press and public from the trial during the state's case, but conducted a public trial during the defendant's case. [For the trial judge's ruling and the unsuccessful challenge thereof by several newspapers and press associations, see *United Press* v. *Valente,* 281 App. Div. 395, digested in 39 A.B.A.J. 413; May, 1954. That case is now pending in the Court of Appeals of New York.] The exclusion motion was made by counsel for one of the state's witnesses; the prosecutor took a neutral position on the motion but it was opposed by defense counsel.

Although the ground claimed by the trial judge was essentially the protection of public morals by preventing the general public from learning the lurid details of the evidence, the Court noted that the prosecution in its opening statement before the public and press were excluded had revealed the same evidence. Too, the Court observed, the trial judge allowed a 19-year-old girl defense witness to be cross-examined about drug addiction while the trial was open.

The Court declared: "It becomes apparent that to place in the hands of any court the power in a criminal trial to close the doors of a courtroom during the presentation of the case of one party and open it when the other party undertakes to present his case creates a situation that should not be tolerated. . . . We are unwilling to place the stamp of approval upon any such unorthodox and, in this case, unwarranted procedure."

(People v. *Jelke,* N.Y. S. Ct. App. Div., 1st Dept. May 18, 1954, Bastow, J. 130 N.Y.S. 2d 662.)

Witnesses . . . subpoenas

■ A summons is in effect a subpoena, and subpoena is a generic term which includes *subpoena duces tecum*. This is the holding of a New Jersey court in construing a provision of the Uniform Act To Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, which has been enacted in New Jersey.

The Act provides that after a specified procedure the domiciliary state issues "a summons" requiring the witness to attend and testify in the sister state's court. New York was seeking not only the witness but also some of his records. He was willing to go himself, but he contended that under the Uniform Act he could not be required to take and produce his records.

The Court rejected this contention and ruled that the term "summons" meant a subpoena, and that in turn, under New Jersey case law, the term "subpoena" included a *subpoena duces tecum*. The Court also stated that statutory protection from arrest and service of process afforded by the Act to the person when complying with the summons would also be afforded to the property produced under the *duces tecum* feature of the subpoena.

(In re Saperstein, Super. Ct. N.J., App. Div., April 19, 1954, Eastwood, J., 104 A. 2d 842.)

What's Happened Since . . .

■ On June 1, 1954, the United States Supreme Court:

DISMISSED AS MOOT (six-to-one with a *per curiam* opinion) *Alton* v. *Alton,* 207 F. 2d 667 (digested in 39 A.B.A.J. 1097; December, 1953), in which the Court of Appeals for the Third Circuit had invalidated as unconstitutional a statute of the Virgin Islands providing that six weeks' residence in the Islands gave the local court divorce jurisdiction "without further reference to domicile", if the defendant had been personally served. The case was dismissed as moot because the parties had obtained a Connecticut divorce during the period in which the appeal to the Supreme Court was pending.

■ On June 7, 1954, the United States Supreme Court:

REVERSED (five-to-three with opinion by MR. CHIEF JUSTICE WARREN) the decision of the United States District Court for the District of Columbia in *U.S.* v. *Harriss et al.,* 109 F. Supp. 641 (digested in 39 A.B.A.J. 321; April, 1953), and held that the registration, reporting and disclosure provisions of the Federal Regulation of Lobbying Act are not unconstitutional for vagueness nor for violation of freedom of speech guarantees. The Court did not reach a ruling as to the constitutionality of the section of the Act proscribing

any attempt to influence legislation for a period of three years following a conviction under the Act.

DENIED CERTIORARI in *California* v. *U.S.*, 119 F. Supp. 174 (digested in 40 A.B.A.J. 426; May, 1954), leaving in effect the decision of the United States Court of Claims that an 1861 statute and the so-called Chase Regulations issued thereunder bar recovery by California from the United States of claims for expenses in connection with aiding the United States during the Civil War.

DENIED CERTIORARI in *Maryland Jockey Club* v. *U. S.*, 210 F. 2d 367 (digested in 40 A.B.A.J. 328; April, 1954), leaving in effect the decision of the Court of Appeals for the Fourth Circuit that the receipt by a race track operator of money from a state racing fund to rebuild the racing strip was taxable income and not a nontaxable subsidy.

DENIED CERTIORARI in *Cain* v. *U.S.*, 211 F. 2d 375 (digested in 40 A.B.A.J. 625; July, 1954), leaving in effect the decision of the Court of Appeals for the Fifth Circuit that the imposition of an additional tax on self-employed persons for coverage in social security system is not unconstitutional.

DENIED CERTIORARI in *Mitchell* v. *Pilgrim Holiness Church Corporation*, 210 F. 2d 879 (digested in 40 A.B.A.J. 424; May, 1954), leaving in effect the decision of the Court of Appeals for the Seventh Circuit that constitutional freedom-of-religion guarantees do not preclude application of the Fair Labor Standards Act to a religious corporation operating a printing plant and selling printed material mostly to out-of-state customers.

John Marshall Bicentennial Year

■ Busts of John Marshall and his teacher, George Wythe, America's first law professor, will be unveiled in September of 1954 at the College of William and Mary at Williamsburg, Virginia, in commemoration of the beginning of the John Marshall Bicentennial Year and the one hundred seventy-fifth anniversary of the establishment of the first chair of law in the United States at that institution. Wythe also taught two Presidents of the United States, Thomas Jefferson and James Monroe. Henry Clay was for four years clerk of Wythe's court. Wythe, along with Jefferson and Pendleton, made the first revision of the Virginia laws after the start of the Revolution. He was also a signer of the Declaration of Independence, and was one of the first judges to lay down the principle that a court can annul a law deemed to conflict with the Constitution, a doctrine which Marshall later made important to our American way of life.

John Marshall could appropriately be called the molder of American nationalism. As a result of his significant decisions during the formative period of American jurisprudence, the supremacy of the Federal Government in the fields of banking and foreign and interstate commerce became established, the sanctity of contracts fully protected, the doctrine of judicial review firmly implanted and the principles of international law developed.

It is proper that busts of these great leaders of the American Bench be carved and appropriately housed, and that the Bar of America take this occasion to rededicate itself to the principles of liberty and justice to which these men gave such great service.

The sculptor, Felix W. de Weldon, a member of the National Commission of Fine Arts, created the large monument of the marines at Iwo Jima located at Quantico, Virginia. The Department of State sought the services of Mr. de Weldon in placing a bust of George Washington in the Embassy at Canberra, Australia. His small statue of James Monroe is in the Monroe Museum at Fredericksburg, Virginia.

This undertaking has already been informally approved by eminent members of the Bar and Bench, as well as prominent men in other walks of life. Invitations will go forward soon to a number of distinguished persons asking that they serve on an Honorary Committee for this celebration.

Department of Legislation

Charles B. Nutting, Editor-in-Charge

■ The following article on federal legislative procedure in Brazil is another in a series dealing with comparative legislative procedure. The authors are distinguished members of the legal profession in Brazil, and the editor in charge acknowledges with thanks their willingness to contribute to the series.

Federal Legislative Procedure in Brazil

by Hamilton Prisco Paraizo and Celso A. Frazao Guimaraes

■ The United States of Brazil is a federative republic with a presidential type of government. The federal government has exclusive power to legislate with respect to numerous matters of national concern including civil and commercial law. Its power in this respect is considerably broader than that of the Congress of the United States of America. It also has concurrent legislative power in a broad field. The states also have some exclusive legislative power, largely with respect to taxation. In addition, municipal governments exercise legislative power within certain areas. Because practically all private law as well as the major portion of public law is federal, the following discussion will be confined to federal legislative procedure.

The Federal Bicameral System

The federal legislature is bicameral in character, being composed of a Chamber of Deputies and a Senate. The former is made up of representatives of the people elected by a system of proportional representation in the states, the federal district and the territories. The latter is composed of three representatives of each state and of the federal district elected according to the majority principle. With a few exceptions each house has identical functions. A measure approved by one house is sent to the other for consideration. It may be approved in its entirety, rejected or amended. In the situation last mentioned it is returned to the originating house for action on the amendments. Generally speaking, legislation may originate in either house, but there are certain exceptions. For example, the power to initiate legislation fixing the size of the armed forces and on all matters of finance is vested in the Chamber of Deputies and the President of the Republic. Also, the discussion of any bill initiated by the President of the Republic must commence in the Chamber of Deputies.

Participation by the Executive

Participation by the executive in the legislative process is largely confined to the power to initiate legislation and to the veto. The President may submit proposed laws on any subject to the Congress. Furthermore he has exclusive power to initiate laws which modify, during the term of each Congress, the law which fixes the size of the armed forces, laws creating positions in existing public services and those which increase the salaries of public officials. The initiative power in the two latter cases, however, does not extend to the administrative services of the houses of Congress or to the federal courts.

Matters that do not fall within the exclusive jurisdiction of Congress are submitted for presidential approval by the house which has last voted. Ten working days are allowed for approval, and if a bill is neither approved nor vetoed within this period, it is considered approved. A veto may be total or partial. A bill may be vetoed only on grounds of unconstitutionality or because it is believed to be contrary to the public interest. The grounds for the veto are communicated by the President to the Chairman of the Senate or, if the Congress is not in session, are published in the official gazette. The veto is considered in a joint session of the Congress and can be overridden only by the vote of at least two thirds of the members of Congress present. When a veto is thus rejected, the bill is sent to the President for promulgation and, if it is not promulgated within forty-eight hours, the Chairman of the Senate or, in case of his failure to act, the Vice Chairman, may promulgate the measure.

The constitution also provides for attendance by the ministers before either house or any committee of either house for the purpose of furnishing information. The ministers may also on their own initiative ask to be heard to clarify measures or to solicit legislative action. This arrangement, which has been highly advantageous in practice, creates a simple means of contact among those responsible for governmental functions constituting, as it does, a process of collaboration between the executive and legislative branches.

Internal Regulations of the Houses of Congress

The constitution does not cover the whole subject of legislative procedure nor does it regulate the matter in every detail. Many points are controlled by the internal rules of the Chamber of Deputies and Senate individually as well as by the common internal regulations of Congress.

These rules and regulations, following the framework of the constitution, supply the details and specify the procedure through which the proposed laws must go; they create committees and assign their respective duties; they institute the formalities and requirements for the presentation of a bill, its discussion and voting on the bills as well as for the adoption of amendments, discussion of the presidential veto and so on.

The Parliamentary Committees. In Brazil, as in most of the nations with democratic organization, there is a serious problem to be faced and solved by political science. This is the one of reconciling the typically political system of electing legislators with the ever-growing technical nature of the matters which they are called upon to legislate. The creation of the so-called Permanent Committees is a partial solution. Besides the Permanent Committees, both the Chamber of Deputies and the Senate have other Committees, called "Temporary" or "Special" which were created to handle important problems, though of a transitory character, requiring action by the State. The constitution (Article 40) assures the proportional representation of the national political parties in the composition of all these committees.

Processing of Bills in the Chamber of Deputies. The real legislative functions of Congress are exercised in connection with proposed legislation in the form of laws or resolutions. The latter are designed to regulate internal matters of a political or administrative character. Thus, a resolution may have as its subject the loss of a deputy's mandate; the granting of leave of absence to a deputy; the creation of a special investigating or mixed committee on any subject concerning the internal economy of the Chamber.

The proposed laws are presented to the presiding Board (MESA) of the Chamber who may refuse to receive them whenever they deal with matters over which the Chamber lacks jurisdiction, or whenever they delegate to another branch of the government powers which belong only to the legislative branch. They may also be refused if they are clearly unconstitutional, are in conflict with the internal regulations of the Chamber, contain expressions considered offensive, include recommendations to another branch of the government, are drafted in such terms that it is impossible simply by reading them to determine what is the action to be taken or where the transcription of the law, decrees, regulations, contract or concession to which they refer is not furnished.

Upon accepting a proposed law, the presiding Board (MESA) distributes it to the committees which, by reason of its subject matter, must consider and report on the measure. If one of these committees is the Constitution and Justice Committee, it will be the first to act. The proposed law, if considered unconstitutional by the absolute majority of the Constitution and Justice Committee, instead of being sent to the other committees will be submitted to the full house for prior discussion of the report holding it to be unconstitutional.

In the committee, the bill is assigned to a reporter who must present his opinion within a period of ten days. This period may be extended by the chairman of his committee for ten days more upon a reasoned request by the reporter. If the reporter does not present his report within the required time, another reporter will be appointed. The report and opinion of the reporter is submitted to the committee by its chairman for discussion, for the length of time its chairman may determine, and after discussion, the votes are taken.

If the committee approves the report and opinion of the reporter, such a report and opinion will be considered the report and opinion of the committee itself. If the committee rejects the report and opinion of the reporter, another reporter will be designated for the purpose of drafting whatever has been decided by the committee.

The committees may recommend that proposed laws submitted to them for study be approved or rejected wholly or in part. They may also present substitutes as well as amendments or subamendments thereto.

Decisions of the committee are reached by a simple majority, the presence of an absolute majority being required for deliberation and decision. Any deputy may attend meetings of the committees, participate in their discussions and suggest amendments, which, however, must be subscribed to by at least three members of the committee.

Once the study of a proposed law by the appropriate committees is complete, the proposed law is sent to the presiding Board (MESA) of the Chamber which then takes the necessary steps for its publication in the *Diario do Congresso Nacional.* In the five following days, the presiding board (MESA) gives notice that the proposed law is to be included in the agenda within forty-eight hours for the first discussion by the full house. During all the time in which the proposed law remains on the agenda for discussion, amendments may be offered to it by any deputy. When the first discussion is terminated, these amendments are sent to the proper committees for study and report, and once the bills and amendments are returned to the presiding board (MESA) with respective reports by the committees, the proposed law is once again published in the *Diario do Congresso Nacional* as well as in leaflet form. It is then placed on the agenda for second discussion, during which time amendments still may be presented, provided they are subscribed to by at least twenty deputies.

The discussion is generally on the proposed law as a whole. However, it may also be discussed paragraph by paragraph, chapter by chapter, title by title, section by section, or groups of paragraphs by groups of paragraphs.

If there are no amendments or, in case of amendment after the pertinent committees have already presented their reports and opinions within the period of five days (extendable for another five days), the proposed law is ready to be presented to the full house for a vote.

Except for the cases expressly mentioned in the constitution as requiring a special "quorum" and a special majority, determinations by the Chamber of Deputies are made by majority vote, the presence of the majority of their members being the required quorum. The voting may

be "symbolic", "nominal" or "secret". According to the constitution (Articles 43, 45 §2, 66, VIII, 213) and to the Chamber's internal regulation (Articles 129, sole § and IV) the secret vote is required in elections, in cases of authorization for criminal prosecution of a deputy, judgment of the accounts of the President of the Republic, suspension of parliamentary immunities of deputies and loss of a deputy's mandate, as well as in cases in which the presiding Board (MESA), *ex officio* or as per request of any deputy, may consider the proposition an important one, and where this voting procedure is demanded by one third of the deputies.

The amendments are classified and voted upon in two groups; those with a favorable report and opinion by the committees, and those with contrary report and opinion. After the amendments have been voted, the proposed law is voted upon as a whole, except if the full house decides that the amendments are to be voted one by one, or that the bill is to be voted by title, chapter, section, groups of paragraphs or by paragraphs.

Requests may also be submitted to the chairman of the Chamber for *"Destaque"* (separation) so that certain amendments are voted separately at the end.

When the bill is rejected, it is considered defeated and it will be tabled. If approved, it is sent to the drafting committee together with the amendments which have been accepted. The drafting committee prepares the final draft according to what was decided, and, if necessary, it may present drafting amendments. A few bills, such as the ones containing the budget, fixing the armed forces, modifying the Chamber's internal regulations *(Regimento Interno)*, or dealing with matters relating to the internal economy of the Chamber, rendering the accounts or changing certain codes for which special committees have been created, are not sent to the drafting committee but are returned to the special committees concerned. After approval of the final draft, the bill goes to the Senate for revision.

This is the normal procedure of a bill in the Chamber of Deputies. The system, however, permits exceptions arising from the regime of urgency which will be considered hereafter, as well as other exceptions to legislative procedure with regard to the budget and to laws granting special credits, which, due to their particularities, do not fall within the scope of this study.

Regime of urgency. In case of a regime of urgency, certain regulatory formalities are dispensed with in order that proposals which must be put into effect immediately may be considered without delay and without interruption until a final decision is reached. The adoption of the regime of urgency does not dispense either with the necessity of a quorum or of distribution of the proposals in pamphlet form. The request for urgency is not subject to discussion but only to vote, and may be presented to the presiding Board (MESA) by a committee competent to report on the merit of the proposition, by a leader of a party (political party), by the author of the proposition plus fifty deputies, or by seventy-five deputies.

Where the urgency is granted, discussion of the bill starts in the next following session. The bill is placed first on the agenda for discussion. The report by the competent committee may be verbal or written. The chairman of the Chamber, however, may grant a time limit of forty-eight hours for consideration and reporting by all committees. This time having elapsed, the bill will be placed for discussion with or without the report. Where amendments are offered to the bill, they will be published within twenty-four hours and voted upon immediately after, with the verbal opinion of the committees. The time for final drafting is only twenty-four hours, but the chairman of the Chamber of Deputies may grant an extension of this time of from four to eight days when the bill is a long one or it is a code. Also, when codifications or projects which require long study are involved, the full house may, upon a proposal by the presiding officers, extend the period of forty-eight hours assigned to the committee to render their report.

Legislative Procedure in the Senate. In the Senate, the course of the proposed laws is in essence the same as that adopted by the Chamber. There are, however, some points of difference, the most important of which may be summarized as follows: (1) In order to be considered, proposed laws presented by any senator must be supported by at least five other senators, except those bills which (a) authorize the Government to declare war or make peace; (b) grant or deny authorization for foreign armed forces to cross or be stationed on Brazilian territory; (c) decide definitely on treaties and conventions with foreign states; (d) declare a state of siege in one or more points of the national territory; (e) approve or suspend a state of siege decreed by the President of the Republic during the recess of Congress. (2) In the first discussion the Senate initially considers the bill and afterwards the amendments. In the second discussion, on the contrary, the amendments are voted upon first and the bill last. (3) Under the regime of urgency, wherever the proposition involves matters of public policy or a public calamity, the full senate starts to deliberate right after the concession of urgency, even if doing so requires the interruption of any speech, discussion or voting, whatever the phase of the work at hand. In other cases, according to the importance and urgency recognized, the proposition shall be submitted for discussion in the same session, right after the agenda or it will be given first place on the agenda of the following ordinary session. (4) The concession of urgency does not exclude the necessity of a report by the proper committees, which, however, will be produced verbally within two hours, when the proposition is to be discussed in the same session, and in writing, without necessity of publication in other cases.

Effective Date of the Law

After the law is sanctioned or promulgated, in the manner described above, it must be published in the Official Gazette (*Diario Oficial da União*). This is an essential formality, without which no law can become effective.

Except where provision is made to the contrary, the law becomes effective in Brazilian territory forty-five days after it has been officially published, but its application in a foreign state, when admitted, will start only three months after the date of said publication.

If, before the law becomes effective, republication of its text is made for purposes of correction, the time limits above mentioned will start to run again from the new publication. If, however, the republication took place after the law became effective, the corrections are considered a new law.

Tax Notes

■ Prepared by Committee on Publications, Section of Taxation, Harry K. Mansfield, Chairman.

Trust and Lease-Back

■ Use of a trust and lease-back to split income with children or other members of the family has finally received Tax Court approval. *Albert T. Felix*, 21 T. C. No. 90 (1954). This marks the culmination of a series of decisions which began in 1947 when the Tax Court held that the trust and lease-back technique failed to produce the desired shifting of income. *A. A. Skemp*, 8 T. C. 415 (1947).

From the very beginning, the problem and the issues have been clear-cut. The taxpayer owns property which he uses in his business or profession. He sets up a trust with an unrelated, independent trustee, such as a trust company or his lawyer. He then either gives or sells to the trust the property which he needs in his business or profession. It is understood, either by specific provision in the trust instrument or otherwise, that the trustee will immediately lease the property to the taxpayer. The trustee makes this lease at a rental which is unquestionably reasonable.

Every step in this transaction is, in fact, bona fide and in compliance with state property law. The effect, however, is to shift some of the higher bracket taxpayer's income over to the lower bracket trust (and thus to beneficiaries who are natural objects of the taxpayer's bounty) by means of a rent payment which would ordinarily be deductible as rent or some other business expense. The Commissioner has, understandably enough, contested this procedure, but with practically no success.

The issue was first presented in the *Skemp* case. There, the taxpayer, a physician, created a twenty-year irrevocable trust for the benefit of his wife and eight minor children ranging in age from 9 to 21 years, with the local corporate trust company as trustee. He transferred to the trustee the title to the building he had been using for his medical office. The trust instrument itself reserved to taxpayer the right to a lease and to approve any sale, mortgage, etc., of the property by the independent trust company. The Tax Court, with two judges dissenting, concluded that taxpayer hadn't really parted with a present interest in the property, so that there was no gift in trust. Consequently, there was no real rent payment which could be deducted by the taxpayer.

On petition for review, the Court of Appeals for the Seventh Circuit reversed the Tax Court. The twenty-year irrevocable trust was real; the transfer of the title to the property complete. The trustee was legally required to collect rent and the taxpayer to pay it. The fact that the taxpayer himself created the situation which required him to pay rent and that the trust's rent income went to his wife did not warrant a disallowance of the rent paid by him to the trust. *Skemp* v. *Commissioner*, 168 F. 2d 598 (7th Cir. 1948).

In 1949, the Tax Court was again faced with the same problem. The taxpayers, a husband and wife, were desirous of providing for the future security of their two minor children. They created two irrevocable trusts for the benefit of the children, with their lawyer as trustee. The taxpayers transferred to each trust a half interest in coal property and a railroad siding which were leased back to them by the trustee the day after creation of the trust. This time the Commissioner claimed that the rentals and royalties paid by the taxpayers to the trust were not deductible because they were nothing more than an assignment of profits from the business of the taxpayers to the children.

The Tax Court found that the gift to the trust and the lease-back to the taxpayer-grantors constituted a single integrated transaction which resolved itself into a gift of income by means of rent payments. The Court took note of the Seventh Circuit's *Skemp* decision but specifi-

cally refrained from following it, with six judges dissenting. *Helen C. Brown,* 12 T. C. 1095 (1949).

This case was appealed to the Court of Appeals for the Third Circuit, which also reversed, just as the Seventh Circuit had in the *Skemp* case. The Third Circuit found that the irrevocable trusts were valid and the conveyances to the trusts complete. The lease-backs were made at reasonable rentals. The fact that these transactions were prearranged was held not to be significant. The controlling factor was that a new, independent owner of the properties, the trustee, required the taxpayer to pay rents and royalties for continued use and possession of the properties. The Seventh Circuit's decision in *Skemp* was cited with approval. *Brown* v. *Commissioner,* 180 F. 2d 926 (3d Cir. 1950). One circuit court judge dissented in the *Brown* case but his reason for upholding the Tax Court was procedural rather than substantive in nature.

The latest development in the trust lease-back picture came with the Tax Court's decision in the *Felix* case in February, 1954. Here, the factual situation varied somewhat from the *Skemp* and *Brown* cases in that the trustee was given money to purchase certain mining equipment from the taxpayer-grantor of the trust instead of receiving the property as a direct gift.

The Commissioner disallowed the taxpayer's rent deductions for the same reason he had advanced in the *Brown* case, namely, that the entire transaction was merely an assignment of part of the taxpayer's business income to the trust beneficiaries. He also added a claim that the trustee, a public trust company, was not really independent because it bought only the property suggested by the taxpayer, that no business purpose was served by the entire transaction, etc.

This time the Tax Court interpreted the facts along the lines suggested by the circuit courts in the *Skemp* and *Brown* cases. It found a valid trust, sale and lease and, specifically adopting the view expressed by the appellate courts, held, with four dissents, that the rent payments were deductible as ordinary and necessary business expenses.

Judge Raum in the dissenting opinion said: "It is inconceivable to me that Congress ever intended to permit deductions of the type approved herein, notwithstanding the elaborate effort to cast them in the form of business expenses, a mere device without economic reality or substance regardless of whether the transactions may or may not properly be described as 'bona fide'."

The dissent in the *Felix* case highlights the problem which runs through the seven-year court history of the trust lease-back arrangement. A taxpayer knowingly undertakes a series of transactions, each one of which is valid in itself. The *net effect* of the whole series is to shift income from a high to a low bracket taxpayer. Should the tax consequences be based on the *net effect* or on giving weight to each of the valid steps? *(Cf. Chamberlin* v. *Commissioner,* 207 F. 2d 462 (6th Cir. 1953), certiorari denied, March 8, 1954.) The same problem has arisen in various areas of the tax law without any uniform results. In the trust lease-back situation, the present trend is clearly away from the net effect test, although it is still possible for other circuit court decisions to tip the scale in the net effect direction at some future time.

To benefit from the prevailing view as represented by the *Felix* case, taxpayers who contemplate using the trust lease-back arrangement should remember these points:

1. The trust should be clear and irrevocable (although there seems to be no reason why it cannot be limited to a specific number of years as long as it meets the requirements of the *Clifford* rule).

2. The trustee should be truly independent, such as public corporate trustee or an unrelated lawyer.

3. The gift or sale of property to the trust should be complete and without any strings attached.

4. The rent charged to the grantor should be able to meet the most critical standards of resasonableness.

The Tax Court in a memorandum decision has upheld a gift and lease-back where the gift was made *directly* to the grantor's children without interposition of a trust. *A. N. McQuown,* 12 T.C.M. 654 (1953). (See Tax Note, *"Splitting Family Income Without a Partnership"* in AMERICAN BAR ASSOCIATION JOURNAL, October, 1953.) However, a grantor would seem to be in a stronger factual position when he makes use of an independent trustee. The Commissioner will find it fairly difficult to prove that a corporate trustee or lawyer is not really independent (although that will not prevent him from claiming lack of independence as he did in the *Felix* case). On the other hand, parental control over children is sufficiently common to require a good deal of explaining away, although the taxpayer-parents were successful in the *McQuown* case.

Contributed by Committee member
Leon Gold

A CORRECTION

■ In the "Summary of Program" for the forthcoming Annual Meeting, published on page 571 in our July issue, we stated that Charles P. Henderson, member of the Commission on Intergovernmental Relations, would address a luncheon meeting of the Mineral Law Section. This is incorrect. Mr. Henderson will address the Municipal Law Section at a breakfast meeting in the Blackstone Hotel on Monday, August 15.

OUR YOUNGER LAWYERS

Thomas G. Meeker, Secretary and Editor-in-Charge, New Haven, Conn.

■ During February the Conference received a special request from the American Bar Association's Committee on Judicial Selection, Tenure and Compensation to help explore and develop widespread support among the Bar for the proposals of the Segal Commission looking toward raising judicial and congressional salaries. The senior bar committee expressed gratification at the help received.

In past years, as well as this year, our organization has co-operated with the Conference on Personal Finance Law in developing debates on various subjects in the small loan field, at our Annual Meetings. Members of various lending institutions connected with the Conference on Personal Finance Law have come to know our organization and officers during a period of several years. One of these lending institutions, Beneficial Loan Corporation, has donated $7,500, for the purpose of establishing a permanent research unit for the Junior Bar Conference in the American Bar Center.

We have enjoyed very cordial relations with the American Law Student Association, particularly with its Executive Director, James Spiro. We have attempted to continue the program of local co-operation, and have sought especially to relate the work of committees of the two organizations which operate in similar fields, including membership, placement, practice development and minor courts.

By far the most sustained and extensive co-operative project which has been developed this year has been our work with the Association's Standing Committee on Membership.

The five state leaders from the standpoint of total applications submitted to date are as follows:

Florida	84
Pennsylvania	82
California	78
Texas	54
Louisiana	50

The JBC Membership Committee has participated in the development of a lapel pin reading, "Ask Me About ABA Membership". These have been distributed to membership workers in all states.

General Survey of the Conference

Without any question, the primary emphasis in the activity of the Conference during the past year has been placed on membership. On June 30, 5,000 new applications had been received.

We have printed and distributed more than 20,000 copies of a red, white and blue JBC "Fact Brochure", explaining various advantages of membership; we have set up and maintained membership booths at regional meetings; we have established quotas for each of the different states for the calendar year 1954, and are using many different methods for urging the states to reach or exceed their quotas; we have distributed letters and extra copies of the *Young Lawyer* to thousands of nonmembers in connection with regional meetings; and we are contemplating a "Law Students' Membership Month", perhaps in September, when we can reach those newly admitted to the Bar and urge them to become members.

Election Procedures Are Studied

Your editor observed that one of the most important problems facing the Council at the Mid-Winter Meeting was that of election procedures. At our request Morgan P. Ames, of Stamford, Council member from the 2nd Circuit and Chairman of a Special Committee to consider the problem reports as follows:

One of the important questions to come before the Annual Meeting of the Conference in Chicago in August will be the matter of the Conference's procedures for the nomination and election of members of the Executive Council. A Special Executive Council Committee appointed by Chairman C. Baxter Jones, Jr., at the Atlanta meeting of the Executive Council on March 7, 1954, will present a report. This

Chairman Jones Announces the Filing of Nominating Petitions

■ On June 16, 1954, Chairman C. Baxter Jones announced that nominating petitions have been received for the offices of Chairman, Vice Chairman and Secretary of the Conference and for the positions of Councilmen for the Fourth and Sixth Circuits. Petitions were filed as follows:

For Chairman, Stanley B. Balbach, Urbana, Illinois
For Vice Chairman, Robert G. Storey, Jr., Dallas, Texas
For Secretary, K. Douglas Mann, Detroit, Michigan
Thomas G. Meeker, Washington, D. C.
For Councilman from the Fourth Circuit, Bert H. Early, Huntington, West Virginia
Charles H. Levering, Baltimore, Maryland
For Councilman from the Sixth Circuit, Harold H. Draper, Jr., Michigan
Rosemary Scott, Grand Rapids, Michigan

Committee is comprised of Richard H. Bowerman, Stanley B. Balbach, Robert L. Meyer, Alvin B. Rubin, and Morgan P. Ames, Chairman.

Article IV of our By-laws is entitled "Executive Council". Section 4 (b) provides in part:

> The nominating and election of Council members shall occur at the same time and place, and in the same manner as, the nominating and election of officers. . . .

The nomination and election of officers is governed by Article III, Section 3 which provides, in brief, (b) that each State Chairman recommends to his Council representative a member from his state to serve on the nominating committee from that Council District; (c) the Councilman designates the member of the nominating committee; (f) nominations are made, and (g) elections take place (h) by the general membership by written ballot. The state in which the annual meeting is held (and the election is conducted) may not have more votes counted from among its members than the number of votes from the other state having the highest number of votes.

Thus, essentially, councilmen are nominated by a nominating committee composed of one representative from each of the various circuits, and election of each councilman is by the general membership. The result is, of course, that the power to elect a councilman is not confined to members living within his own circuit.

The history of this election process appears under the heading "Election Process" in Fellers, "The Junior Bar Conference", which may be found in *Rocky Mountain Law Review*, Vol. 25, No. 3 (April, 1953). He states in part:

> It was agreed among its early participants that, if the Conference was to survive and do its most effective job, there could be no place for "politics" in the usual sense of the word. It was not possible for members who gather once a year from all parts of the country to know personally the qualifications of various candidates for office. Some groups had to screen the prospects. The high caliber of the appointments to the nominating committee and the satisfactory performance by those selected may explain the tolerance of the members for the admittedly undemocratic method of selection.
>
> No continuing political control by any individual or group of individuals is manifest in the history of the Conference. It is "managed" by a relatively small number who are in power. For the most part the "inner circle" has been representative of the younger members of the Bar from all sections of the country and all walks and stages of the profession. . . .
>
> Fifteen years after the Conference was established, a special committee of its executive council appointed to consider various matters of policy, organization and administration, reported as follows:
>
> The procedure for the nomination and election of officers and councilmen is not sufficiently democratic and is not designed to advise the electorate of potential candidates sufficiently in advance of the annual meeting for the electorate to form its opinion with respect to candidates. The Conference is fortunate that, despite these deficiencies, the caliber of its officers has always been of the highest. That fact, however, is not sufficient reason why a deficient system should be perpetuated.
>
> Two factors appear to have contributed to the recent dissatisfaction expressed by the special Conference committee. The primary factor is an apparently genuine feeling on the part of a number of young lawyers that the procedure was not sufficiently democratic in that it afforded no opportunity for the general membership to participate directly in the selection of those who were to have the main burden of naming Conference leaders. Concededly, the procedure warranted improvement, but it was not clear that there was a better means of meeting the peculiar situation.

At the Atlanta meeting in March, 1954, Frank E. Horka, Information Director of the Conference, re-expressed the thought that the procedure for the nomination and election of councilmen is not sufficiently democratic and, furthermore, that the present procedure does not, as it should, stimulate the interest of state and local groups in the Conference and its activities; nor, it is said, is the present procedure conducive to the optimum co-operation between the councilman of a particular circuit and the leaders of the state and local Junior Bar organizations within his circuit.

Thus, specifically, it has been recommended that the by-laws be amended to provide that the councilman for each circuit should be elected not by the membership of the entire national organization, but rather directly by the JBC members from his own circuit.

The Special Committee which is to report on the proposed amendment to the By-laws respecting election of councilmen will work in co-operation with Donn Gregory, Chairman of the By-laws Committee, and Lofton Tatum, Chairman of the Activities Committee.

On May 4 and 5 Chairman C. Baxter Jones, Jr., attended the Annual Meeting of the Louisiana Bar Association at Biloxi, Mississippi. Chairman Jones spoke to the Louisiana Junior Bar on "The Junior Bar —Its Benefit to the Profession of Law". Meetings of the Louisiana Junior Bar were presided over by Ben C. Bennett, Jr., JBC State Chairman for Louisiana.

On June 3 Chairman Jones spoke to the Iowa Junior Bar during the Annual Meeting of the Iowa Bar Association at Des Moines, Iowa. During the same meeting, John Baylor, Council Representative from the Eighth Circuit held a meeting of the State Chairmen in his area. Leaving Des Moines, Chairman Jones met with the Annual Meeting Committee and with many of the personnel at American Bar Association headquarters to make plans for the Annual Meeting in Chicago.

On June 10 and 11 Chairman Jones attended the Annual Meeting of the Georgia Bar Association in Savannah, Georgia. While at the meeting he appeared at the Younger Lawyers Section and assisted in the setting up of a membership booth and the solicitation of memberships for the Conference.

BAR ACTIVITIES

Paul B. DeWitt · Editor-in-Charge

■ An opportunity to learn about the new Internal Revenue Code from a panel of experts was made available at the Institute on the New Internal Revenue Code, conducted by the Southwestern Legal Foundation at Dallas on June 25 and 26, Charles O. Galvin, Chairman. The Institute, composed of members of the Advisory Staff of the Treasury Department who assisted in drafting the new law, representatives of the Section of Taxation of the American Bar Association, and outstanding attorneys and certified public accountants actively engaged in tax practice, was organized primarily for the benefit of business and professional leaders in the Southwest.

The participants from the Legal Advisory Staff of the United States Treasury Department were Joseph P. Driscoll and Leonard Silverstein. The American Bar Association was represented by the following members of the Section of Taxation: J. Paul Jackson, formerly attorney with the Tax Division of the Department of Justice; Seymour S. Mintz, member of the Emergency Committee on Internal Revenue Code of 1954; George E. Ray, Chairman of the Federal Estate and Gift Tax Committee; Thomas O. Shelton, Jr., member of the Council of the Section of Taxation; Thomas N. Tarleau, Chairman of the Section of Taxation; and Iverson Walker. Other participants were Whitfield J. Collins, formerly attorney in the office of the Chief Counsel of the Internal Revenue Service; Charles O. Galvin, associate professor at the School of Law of Southern Methodist University, Dallas, Texas; W. Boone Goode, President of the Dallas Chapter of the Texas Society of Certified Public Accountants; John W. Riehm, associate professor at the School of Law of Southern Methodist University, Dallas; Truxton L. Shaw, associate professor at the School of Business Administration of Southern Methodist University, Dallas; and Sylvan Tobolowsky, formerly acting head of the Opinions Section of the Office of the General Counsel of the United States Treasury Department.

■ At the annual meeting of The Copyright Society of U.S.A., held on May 18, 1954, at New York University Law Center, Samuel W. Tannenbaum was re-elected President. The other officers elected were Louis E. Swarts and Joseph A. McDonald, Vice Presidents; Theodore R. Kupferman, Secretary; Charles B. Seton, Assistant Secretary, Paul J. Sherman, Treasurer; Theodore R. Jackson, Assistant Treasurer, and the following Trustees: Professor Ralph S. Brown, Jr. (Yale); Professor Walter J. Derenberg (New York University); Professor Benjamin Kaplan (Harvard); Professor Harry G. Henn (Cornell); Sydney M. Kays; Horace S. Manges; Robert P. Myers; Cedric W. Porter; Louis C. Smith; Wilma P. Stine; Philip Wittenberg; James P. Wobensmith; Sidney W. Wattenberg.

The Society is the organization which publishes *The Copyright Bibliographical Bulletin* which is devoted exclusively to the most recent domestic and foreign decisions, legislation and news relating to copyright.

■ The Virginia State Bar Association and The Virginia Society of Public Accountants in co-operation with the Law School, the McIntire School of Business Administration and the Extension Division of The University of Virginia, held their Sixth Annual Conference on Federal Taxation from June 23 to June 26 at the University of Virginia Law School, Charlottesville, Virginia. The conference was devoted to the changes in federal tax law proposed by the Revenue Revision Bill of 1954. Mortimer M. Caplin, Professor of Law at the University of Virginia Law School, acted as Chairman and was also a lecturer. Other lecturers were Charles C. Abbott, Professor of Business Economics at the University of Virginia, Forrest W. Brown, Jr. C.P.A. (Virginia); John D. Carr, Chairman of the Committee on Taxation of the Virginia State Bar Association; C. R. Dale, C.P.A. (Virginia); Adrian W. Dewind, member of the Tax Advisory Group of the American Law Institute; Herbert E. Gouldman, C.P.A. (Virginia); Benjamin Harrow, Professor of Law at St. John's University School of Law, Brooklyn, New York; Wallace M. Jensen, Vice Chairman, Committee on Federal Taxation of the American Institute of Accountants; Charles L. Kaufman, member of the Committee on Taxation of the Virginia State Bar Association; James P. Ould, Jr. C.P.A. (Virginia); E. Grady Paul, member of the Bar (Virginia), formerly with the Internal Revenue Service; Lipman Redman, co-author of "Procedure Before the Bureau of Internal Revenue"; John S. Rennolds, Instructor in Taxation at the Evening School of Business Administration of the University of Richmond; F. D. G. Ribble, Dean and Professor of Law at University of Virginia Law School; Jackson Scovel, C.P.A. (Virginia); Stanley S. Surrey, Professor of Law at Harvard University Law School; Bolon B. Turner, Judge of the Tax Court of the United States; Elbert Parr Tuttle, General Counsel of the Treasury Department, Washington, D. C.; William H. Westphal, C.P.A. (Virginia, North Carolina and Georgia); Ralph P. Yount, C.P.A. (Virginia and District of Columbia); William L. Zimmer, III, member of the Committee on Taxation of the Virginia State Bar Association.

■ The Committee on Lectures and Institutes of the Houston Bar Association sponsored a Tort Institute jointly with the University of Hous-

ton Law School. Dean William L. Prosser, Dean of the Law School of the University of California, was featured at the one-day institute on "New Developments in the Law of Torts". Dean Page Keeton, of the University of Texas Law School, discussed "Slipping and Falling Cases". Dean A. A. White, of the College of Law of the University of Houston, considered the problem of "Contribution and Indemnity Among Tort Feasors" and the final address was delivered by Fred Parks, of the Houston Bar, on "Some Practical Aspects of Recent Developments in Evidence and Procedure".

■ At the Annual Meeting of the Cleveland Bar Association in May, J. Hall Kellogg was installed as President. Eugene H. Freedheim was elected Vice President and Herman H. David, Treasurer for his sixteenth consecutive term. Dr. Will Durant addressed the annual meeting on the subject of "Marriage in Transition".

■ The University of Michigan Law School sponsored an institute on "Communications Media—Legal and Policy Problems". The institute considered problems of interest to businessmen and lawyers working in the publishing, motion picture, radio and television industries. Topics discussed were "The People's Right To Know", "The Freedom of the Press and Judicial Contempt", "Official Controls versus Self-Regulation of Communications Media", "A New Look at the Administrative Law Problems of the Federal Communications Commission", "Re-examination of Problems of Mobile and Point-to-Point Communications", "Reappraisal of the Federal Communications Commission's Policies Regarding Issuance of Broadcast Licenses", and "The Economic Problems of Television Broadcasting".

■ The Toledo Bar Association has exhibited in store windows displays informing the public of laws "that every citizen should know". The posters in the displays touch such subjects as: "How are your investments for estate purposes?" "Have you made your will?" and "Don't buy property blindfolded".

■ The Public Relations Committee of The Florida Bar has published a "Handbook for Jurors", which is to be distributed to the various courts of the state. The Handbook follows the chronological order of a trial from the questioning of the jurors to the summation. The Handbook has been approved by the Judicial Council of Florida, the Circuit Judges Conference, and the County Judges Association.

■ The Advanced Professional Education Committee of the Missouri Bar Association recently published a list of topics and speakers for meetings. The Committee, of which Marlin M. Volz, of the Kansas City University School of Law is Chairman, compiled the list, which is subdivided into various topics with speakers listed under each general heading. The talks are designed to last approximately fifty minutes and are to be presented before local Missouri bar associations.

■ The Akron Bar Association recently sponsored an institute for legal secretaries and office workers. It was designed to acquaint office personnel with the problems that face both the employer and the employee, with especial emphasis on the practices and procedures pertaining to the legal profession and a legal office.

Attending the annual meeting of the Louisiana State Bar Association in Biloxi last May were four members of the American Bar Association's House of Delegates. Shown (left to right) are John D. Randall, of Cedar Rapids, Iowa, nominee for Chairman of the House of Delegates, LeDoux R. Provosty, of Alexandria, Louisiana, member of the Board of Governors for the Fifth Circuit, President William J. Jameson, and Cuthbert S. Baldwin, of New Orleans, State Delegate for Louisiana in the House of Delegates.

Activities of Sections and Committees

SECTION OF CRIMINAL LAW

■ At last the Section's support of federal anti-crime legislation, which it undertook at the time of the Kefauver investigations, seems to be bearing fruit. Several such bills have recently been the subject of hearings before congressional committees, some have already passed one house, and the prospects for enactment of several are reasonably bright.

Supporting testimony has been offered in behalf of the Section, pursuant to authority conferred by the House of Delegates at the 1951 Annual Meeting and the 1954 Midyear Meeting on the following bills:

H. R. 6899, providing for the granting of immunity to witnesses before congressional committees and federal courts and grand juries (hearings before House Judiciary Subcommittee, in which Attorney General Brownell also appeared to press for prompt and favorable action);

H. R. 7118, punishing the use of interstate commerce in connection with conspiracies to violate certain state laws relating to "organized crime offenses" (heard by House Judiciary Subcommittee; this measure, of sweeping effect, is given a very good chance of enactment, at least in the House, during the balance of the present session);

H. R. 7311, reviving the original proposal of the Department of Justice to control the use of interstate communications facilities in connection with bookmaking activities by means of a regulatory pattern imposed and administered through the FCC (hearings before a subcommittee of the Senate Interstate Committee; conflict between the Justice Department and the FCC appears as bitter as ever and may defeat action, but a bill is also pending before the House Interstate Committee and there is some possibility, in view of Administration support, of favorable action in one House or the other);

H. R. 7404, conferring a right of appeal from motions suppressing evidence upon the government, under the Criminal Appeals Act (this bill, noncontroversial and highly useful in closing a loophole in the present law, has already passed the House and will very likely clear the Senate in the near future);

H. R. 7975, expanding the Lottery Act to include other kinds of gambling enterprises and activities (the support of the Section was given on the basis of a formal endorsement of S. 1624, 82d Congress, which made identical changes in the Lottery Act; heard by House Judiciary Subcommittee and might be favorably reported, although it has aroused some opposition);

H. R. 9456, improving the inadequate definitions in the Slot Machine Act of 1951 (this new bill incorporates changes which were endorsed by the Association as part of S. 1624, 82d Congress; provisions of the latter were formally brought to the attention of both the Senate and House Interstate Committees, while administration bills (S. 3190 and H. R. 9079), aimed only at improving administrative features of the Slot Machine Act, were under consideration; in both Houses, prompt consideration, probably favorable, is likely).

The Section's program for the forthcoming Chicago meetings is well under way. Highlights will include a session on Juvenile Delinquency (conducted by Luther Youngdahl with Chief Justice Warren presiding), a lecture-demonstration of scientific techniques for surveillance and detection, to be followed by a panel discussion of the constitutional issues involved, and a "workshop session" on trial techniques, consisting of an actual courtroom episode involving proof of mental competency. Reports will be made on the American Bar Association and American Law Institute study projects, which are now under way, to bring Section members up to date on these important undertakings in the field.

SECTION OF ADMINISTRATIVE LAW

■ The membership of the Section is being circularized for the purpose of obtaining indications of interest in and willingness to serve on committees of the Section. This process has been followed in previous years but it is felt that the Section Chairman, to be elected at the 1954 meeting, will be in a position to make an informed selection, if up-to-date indications of preference for committee work are made available to him. Members of the Section who have not done so, are asked to complete the questionnaire and return it to the Secretary promptly.

The Manual for Chairmen of Section Committees has been completed. It is the work of vice chairman Robert W. Benjamin and incorporates suggestions received from the membership of the Section. It is designed to answer in advance the questions which come up as to the jurisdiction of the Section, its committees, how the committees are

organized and function, and how to proceed with the work of the Section which is in the hands of the particular committee. It provides as background a sketch of the organization and operation of the Association and also a sketch of the organization, operation and field of interest of the Section. The completion of this undertaking is a long step forward and should prove a great help to the work of the Section.

SECTION OF INSURANCE LAW

■ The Section of Insurance Law takes an interesting and educational part in the activities of the American Bar Association.

At the Southern Regional Meeting, held in March at Atlanta, three papers were given: "Compensability of Recreational Accidents", by Edward C. Starkey, of Detroit, Michigan; "Hidden Coverages", by Marion Rushton, of Montgomery, Alabama; and "Effect of Tariff Provisions on Air Carrier Liability", by Charles A. Moye, Jr., of Atlanta, Georgia.

At the Pacific Northwest Regional Meeting, held in Portland, Oregon, the Insurance Section and the Section of Judicial Administration sponsored a one-day trial tactics program. George E. Beechwood, Chairman of the Section of Insurance Law, together with Judge Arthur F. Lederle, Chairman of the Section of Judicial Administration, presided. The program was unique in that it had a practicing lawyer and a judge speak on the same subject matter, following an exchange of their respective papers. This trial tactics program included the following features: "The Pleadings", by Robert F. Maguire and Judge Charles W. Redding, of Portland; "Pre-trial Preparation", by Earle N. Genzberger, of Butte, Montana, and John E. Murray, of Chehalis, Washington; "Presentation of Evidence at the Trial", by A. L. Merrill, of Pocatello, Idaho, and Judge William G. East, of Eugene, Oregon; "Arguments to the Jury", by Tracy E. Griffin, of Seattle, Washington, and Judge Roger J. Meakim, also of Seattle; "Appellate Briefs", by Arthur B. Dunne, of San Francisco, and Judge Douglas L. Edmonds, of the Supreme Court of California, San Francisco; and "Appellate Arguments", by Morgan Anglim, of Reno, Nevada, and Judge Hall S. Lusk, of the Supreme Court of Oregon, Salem.

At the Annual Meeting in Chicago the guest speakers at the Section's meeting at the Palmer House on August 16 will be Leonard W. Hall, Chairman of the Republican National Comittee, and Stephen A. Mitchell, Chairman of the Democratic National Committee. Each speaker will be allotted equal time. Immediately following these addresses, there will be a panel on "Medical Aspects of Herniated Discs", which will include the following participants: Judge Elmer J. Schnackenberg, Moderator, Augustine J. Bowe, attorney for plaintiff, and Joseph H. Hinshaw, attorney for defendant, with Eric Oldberg, M.D., and Edward L. Compere, M.D., as medical experts. B. M. Anderson will give a talk on "Extraterritoriality", while Richard W. Galiher, of Washington, D. C., and Payne Karr, of Seattle, will talk on aviation. Wyatt Jacobs, of Chicago, will reconstruct an automobile accident by expert testimony. The Director of Insurance for the State of Illinois will talk on "Regulation of Automobile Insurance Law". John M. Aherne, of New York, will speak on the "ICC Carrier and the Act of God Defense". I. V. Brunstrom, of Chicago, and Paul M. Roca, of Phoenix, Arizona, will bring the members up to date on the question of taxes and "When Did Ulysses Die?", with respect to life insurance. Theodore Fraizer will annotate "The Applicant's Misrepresentation" in Health Insurance. J. M. Gillen, of General Motors, will speak about that company's benefit plans. What is to be known about "The Valued Policy Statute and the Standard Fire Insurance Policy" will be stated by T. M. Galphin, Jr., of Louisville, Kentucky; James B. Tidman, of Glens Falls, New York, will give "Statutory Provisions Regarding Rights of Labor and Materialmen against Sureties on Contract Bonds". Judge H. A. Middleton, of the Supreme Court of Ohio, together with Wayne Stichter, will conduct the Pre-trial Tactics Panel in connection with "Preparing the Witness", by Wilbert McInerney, of Washington, D. C. "Voir Dire Examination", by Pat H. Eager, Jr., of Jackson, Mississippi "How To Conduct Direct Examination", by Paul J. McGough, Minneapolis, Minnesota, and "What To Ask in Cross Examination", by Lester P. Dodd, of Detroit, Michigan, will be the other highlights of this meeting.

The Section will give its annual dinner on Tuesday night with unusual entertainment, music and dancing.

Life Insurance Investments

(Continued from page 679)

endangered the economic success of the project would have been for it to have failed in its duties to those for whose benefit its funds were held. Having successfully established its right of management, it was in a position to proceed, under self-controlled conditions permitting of trial and error, in the exercise of its best judgment to reconcile apparently conflicting interests and properly to discharge its duties and obligations toward its policyholders, tenants, and the public generally. Certainly, racial prejudice on Metropolitan's part was in no way involved.

Control of rents and earnings.—Another controversy respecting Stuyvesant Town has had to do with rentals. The contract under which the project was built made provision in conformity with the Redevelopment Companies Law for a cumulative annual return of 6 per cent on the investment in the project. This was to provide for interest, amortization, depreciation, and dividends. The contract expressly obligated the Board of Estimate of the city to approve rentals affording the prescribed return. The project was completed in 1949, and in accordance with the contract apartments were originally let at rentals averaging $17 per room per month.

After a year's operation it became abundantly clear that the $17 rental would provide substantially less than 6 per cent on the investment. Following encouraging discussions with city officials, an application was filed under date of December 30, 1950, proposing an amendment of the contract to provide for a new average rental of $21 per month per room. The application was referred to the city comptroller. For eight months, while the deficit in the required 6 per cent earnings continued to grow, the comptroller and his staff studied the figures and finally reported them to be "substantially correct." Nevertheless, after a public hearing, dominantly political in atmosphere, the application was denied.

On January 11, 1952, another application was filed in strict conformity with the contract asking approval of a maximum average basic rental per room per month of $24.87, the amount necessary to provide the required 6 per cent return. Again there was delay as the deficit mounted, but finally the city comptroller reported on May 2, 1952, that the petitioner's figures were correct, and there was no evidence to the contrary. Again the public hearings were political in atmosphere. During the hearings petitioners offered to agree, if the application were granted at once, not to charge the full increase for a period of four years but to keep the average rent increases to the then present tenants at $2.55 per room per month for three years and $3.00 for the fourth year. Finally, the Board of Estimate on May 19, 1952, refused to comply with the contract and rejected the application.

On the same day the owner initiated proceedings under Article 78 of the New York Civil Practice Act to review and annul the action of the Board of Estimate.[25] The court promptly granted the petition but held the petitioners to the offer to limit for four years the full impact of the increase. On appeal by the city to the Appellate Division, the decision of the court below was unanimously affirmed.[26] The new rentals were put into effect for the following rental period without discord, and the case is now before the Court of Appeals at the instance of the city.[27]

The contention of the city was that the statute and the contract must be construed to vest the Board of Estimate with discretion to fix rentals, and therefore earnings, in accordance with an implied standard applicable to middle-income housing. The position of the petitioners was that the expressed standards of the statute and contract must be followed and that there was no room to imply a different standard.

It is important to note that, since any increase in the maximum rental necessary to produce the 6 per cent return provided for by the statute and the contract had first to be approved by an elective body such as the Board of Estimate, responsive to political pressure, costly delay was inevitable. The first family had moved into Stuyvesant Town August 1, 1947; the last apartment had been completed and rented in June, 1949. It had quickly become apparent that the initial rentals would be insufficient, and the deficit in the required earnings was mounting at the rate of approximately a quarter of a million dollars each month or three million dollars a year. Yet, through the exercise of political pressure and despite the very prompt action by the courts when finally the matter reached their attention, the effective date of any rental increase was delayed until the fall of 1952, when the accumulated deficiency was in the neighborhood of thirteen million dollars, and significantly the increase then effected was still not sufficient to provide the contemplated return, so that the deficiency continued to accumulate. It is remarkable that, despite this situation respecting Stuyvesant Town, because of better earnings on other projects, Metropolitan's over-all earnings on its total investment in housing are satisfactory.

It has been suggested that, in order to encourage others to utilize the provisions of the Redevelopment Companies Law and similar statutes in other states, the earnings limitation should be raised, but in the light of Metropolitan's experience a more helpful change would be simply to make the statutory and contractual provisions respecting earnings and rentals self-executing, so that compliance would not depend on any politically constituted body taking the politically unpopular step of increasing rent maxima pursuant to contract. Regrettably, legal obligation and considerations of good faith cannot always be relied upon to prevail over political expediency.

25. *Stuyvesant Town* v. *Impellitteri*, 202 Misc. 661, 114 N.Y.S. 2d 639 (Sup. Ct. N.Y. Co 1952).

26. *Stuyvesant Town* v. *Impellitteri*, 281 App. Div. 672, 117 N.Y.S. 2d 686 (1st Dept 1952).

27. Unanimously affirmed, without opinion, February 25, 1954.

II. OTHER INCOME PRODUCING REAL PROPERTY

Although some European insurance companies have had important direct investments in real estate other than housing for over a century,[28] the first state to permit such investments in this country was Virginia in 1942. Since then some forty states, including New York in 1946,[29] have adopted enabling legislation on the subject. The authority found in the domiciliary enabling statute must be accompanied by an absence of any legal prohibition in the law of the state of the situs of the property.

Typical transactions.—The property acquired may be improved property or property to be improved. In New York it may be acquired in fee or under a long-term lease.[30] It may be operated by the investing insurance company or its agent, or it may be leased to a single tenant which may use it in its business or sublet it to others. The most usual transaction involves fee acquisition by the investing insurance company and a leaseback to the seller on terms providing for the payment by the tenant of all costs, including taxes, and a net rental sufficient to amortize the investment and provide for a fair rate of return during the initial term. The initial term is generally from twenty-one to twenty-five years and must be less than thirty years if risk is to be avoided of the transaction being treated as a nontaxable exchange preventing the seller-lessee from realizing on the sale any loss usable as a current deduction.[31] Tenant options to renew for periods totaling from 30 to 60 years at substantially lower net rentals are common.

As in the case of mortgages, single-purpose properties are less desirable for this type of transaction than are multiple-purpose properties. Unless the tenant has a high credit standing, the conservative approach is to acquire only properties which will be likely to have a ready market for resale or for renting to others in the event the original tenant defaults. This consideration might for instance discourage the acquisition of a particular factory. For New York companies an additional reason for not favoring factories is that the New York Insurance Department by regulation[32] disallows as an investment expenditures for manufacturing machinery, even though the machinery is in the nature of fixtures constituting a part of the realty.

Safety of principal and adequacy of yield in this type of investment are grounded in the earning value of the property which in a particular case may rest upon the high credit standing of the tenant and its ability to pay the agreed rental or in the property's ready rentability at adequate rentals. The latter type usually consists of a well-located office building, to be occupied on terms favorable to the landlord by numerous subtenants of good credit. The credit of the investor's immediate tenant in such a case may not be as important as its skill in operating such a building. The former type, resting as it does so largely on the credit of a single tenant, has been described as a method of corporate financing.[33]

The tenant's position.—Certainly the sale and leaseback technique enables a corporation to its greater profit to use more of its capital in its direct business operations rather than in real estate. It is thereby enabled to increase its working capital without debt financing and without substantially impairing, except for a possible footnote, its balance-sheet picture as a basis for future debt financing. To the extent that the deductible rent exceeds what the deductible interest and depreciation would have been had the property been owned, the technique represents a tax advantage. The deductibility of the full rental may be put in question by the presence of any option in the tenant to repurchase the property at substantially less than its value, for there a part of the rental might be treated as payments on account of the repurchase. For this reason an option in the tenant to repurchase for a nominal amount at the termination of the lease may be a distinct disadvantage to the tenant as well as to the investor. The rejectable-offer provision pursuant to

28. Parry, *Journal of Land and Public Utility Economics*, Vol. XVI (No. 3, August, 1940).

29. N.Y. Insurance Law § 81(7)(h), L. 1946, c. 509.

30. Rep. Atty. Gen. 195 (N.Y. 1947). For a discussion of leasehold acquisitions, see Rodgers, "Leasehold Acquisitions by Life Insurance Companies as Investments for the Production of Income," X *Association of Life Insurance Counsel Proceedings 1949-51*, 193, 325 *Insurance Law Journal* 111 (February, 1950).

31. U.S. Treas. Reg. 118 §39, 112(b)(1)-1; *Century Electric Co. v. C.I.R.*, 192 F. 2d 155 (8th Cir. 1951) *cert. denied* 342 U.S. 954 (1952).

32. N.Y. Insurance Dept, Regulation 28.

33. Cary "Corporate Financing through the Sale and Leaseback of Property: Business, Tax, and Policy Considerations," 62 *Harv. L. Rev.* 1 (1948).

which after the lapse of specified period the tenant may offer to repurchase the property at a determinable price not less than the investor's unamortized investment, with the stipulation that if the offer is rejected the tenant may terminate the lease, is not subject to the same objection.[34]

Another question which sometimes arises is whether a sale-leaseback transaction may violate the provisions of a negative-pledge clause to which the lessee may be a party. Such provisions, if simply prohibiting or restricting the creation of express liens and encumbrances on property of the lessee corporation, would not be violated by the normal leaseback transaction, which certainly is not the equivalent of a mortgage. However, the growth of sale-leaseback transactions has been accompanied by a tendency on the part of lenders specifically to prohibit the borrowing corporations from selling and leasing back their properties except on conditions acceptable to the lenders.

The investor's position.—The attractiveness to the investing insurance company of this kind of investment lies in the somewhat greater return afforded, without much greater risk if careful selection is had. It is true that trustees of a tenant in reorganization may be entitled to disaffirm the lease, with the result that the investor in addition to repossession of the property would be limited to proof of damages in reorganization not in excess of three years' rental (or one year's rental in bankruptcy). However, if the property were essential or even economically desirable to the continuance of the business, the trustees would seek to retain the properties and continue to make rental payments though enjoying a moratorium in debt service. The presence of effective lease provisions such as one making the initiation of reorganization or bankruptcy proceedings an optional event of default may be helpful, but greater protection is afforded by the selection of key properties.

Lease provisions.—This is not to say that the provisions of documents involved in a sale leaseback—the contract of sale and the form of lease—are not important. Since the lease will govern the relations between the parties as to the property involved for perhaps sixty years, its provisions should be right in substance and free from ambiguities. The object of the investing insurance company as landlord is to negotiate and draft a lease which will be truly a net lease in that it will assure the investor of the contemplated net income from the property as safe from impairment by contingencies as foresight and language can make it. General language has an innate indefiniteness, and those seeking a construction favorable to themselves with the full benefit of hindsight and rules of interpretation, such as the rule requiring construction against the drafting party, are resourceful in argument. For these reasons broad general language cannot always be relied upon to reflect the real bargain of the parties.

Some Considerations in Drawing the Leases

It is not enough to say that during the term of the lease all burdens incident to the leased property in respect to operation, taxation, insurance, maintenance, and compliance with applicable laws shall be borne by the tenant without right of diminution of rent. What of unforeseen taxes or special levies of new types? How would a gross receipts tax upon rent as such be treated? How determine from time to time full insurable value? By whom should losses be adjusted? Should not there be different provisions as to minor and major losses? What rules should govern the application of the insurance proceeds? Should maintenance include necessary replacements? How should the burden of a new and unanticipated law expressly placing upon the landlord a costly duty, say, for example, the elimination of smoke, be treated? What rights have the respective parties as regards alterations? Should each minor alteration require the consent of the landlord? If not, how distinguish between minor and major alterations? Should the tenant be permitted to connect the improvements on the leased premises with improvements on property not owned by the landlord? If so, what safeguards should be provided to assure the self-sufficiency of the leased building in case of severance? Should the lease contain a covenant of quiet enjoyment, or should the tenant, as former owner of the property, assume all risks of possible title defects? Has the tenant an obligation to reconstruct in the event of damage or total destruction from an uninsurable casualty? Should there be abatement of rent during the period of reconstruction? Under what conditions, such as deposit in trust of full costs, should the tenant be permitted to demolish and reconstruct, if the building should

34. For a discussion of the tax aspects of sale-leaseback transactions see Research Institute of America, *Federal Tax Coordinator 1952*, Vol. 2, paragraph F-1506. 1, page 12,506.

become obsolete? In the event of condemnation during the initial term, should not any award be first applied to the landlord's unamortized investment? Should not the proceeds of any partial condemnation in excess of the amount required for restoration be applied to the reduction of the landlord's investment? If so applied, should there not be an equitable reduction in rent? That clear answers to all such questions should be found in the lease is the reason the lease forms are generally long.

Assignment of tenant's interest.—Because of a favorable purchase price in the acquisition of the fee, the development of a very favorable subtenant rent roll, or other factors, the rental under the net lease may bear such a relation to the earning power of the property as to give a very substantial value to the tenant's interest in the net lease. Later, under the lower applicable rentals during renewal terms, values will tend to persist or even in some cases to increase. Tenants naturally seek to realize on these values by subjecting their interests to leasehold mortgages or by outright assignment for value. In this connection the landlord-investor may protect itself by express provisions requiring its consent to any such mortgage or assignment. In the type of transaction in which great reliance is had upon the credit of the original tenant, any consent to assignment would naturally involve retaining the obligation of the original tenant. In a noncredit type of transaction it may be appropriate even to agree that consent to assignment will not be unreasonably withheld during renewal terms and that the obligation of the assignee may be substituted for that of the original tenant. Consent to leasehold mortgages would normally expressly enable the mortgagee to perform all the duties of the tenant and thus preserve the value of its security. It is not unusual to provide that if the lease is terminated because of an event of default such as the insolvency of the tenant, which the mortgagee cannot cure, a new lease on the same terms will be granted to the mortgagee on conditions fully protective of the interests of the landlord-investor.

Over the last decade, sale and leaseback transactions have attained a significant position in the investment field. As of the end of 1952 such investments by American life companies are reported to have amounted to $985,000,000.[35] Barring unfavorable tax developments, they may be expected to continue as an established means of financing.

35. Institute of Life Insurance, *1953 Life Insurance Fact Book* (New York 1953), page 73.

Prophecy, Realism and the Supreme Court

(Continued from page 683)

vance of the "justiciability" doctrines to our problem. For concrete sets of facts will frequently suggest their own just resolution to men of substantially common cultural background. In their handling, there is certainly less need—and probably less play—for broad theories, political or otherwise, than where more abstract questions are to be decided; narrow agreement on the outcome of a specific case nearly always comes much more easily than concurrence in broadly stated policy. A stiffened requirement[17] of "justiciable controversy"—that dispute be on a detailed and specific set of facts presented by parties actually involved—will not ensure frequent agreement among members of the Court, but it might help to reduce the number of occasions when Justices feel compelled to speak apart from the Court.

To secure this result, it will often be necessary also that the factual issue be narrowly treated. The line of cases in recent years dealing with racial segregation in education may be an instance where the Court's unanimity was facilitated by such an approach. The decisions moved in comparatively small steps from the necessity of providing a Negro with a law school within his own state, through the issues of the equality of a separate law school within Texas and of the equality of treatment accorded a Negro within the University of Oklahoma graduate school, to the current cases regarding the public schools. At each of these stages, the decision was unanimously taken, but it may well be doubted whether such a consensus could have been achieved were the over-all broad question to have been resolved in the first case. This narrowing of treatment to the specific facts is one of the things which can be brought into fuller operation—in "justiciable" cases—by a heightened institutional awareness within the Court. But without the specificity of the concrete case, without a real "justiciable controversy" before the Court, such awareness has no common denominator toward which to operate and thus cannot alone achieve the result.

These basic doctrines requiring a "justiciable case", "standing to sue" and narrow treatment of constitutional issues have long been recognized in the tradition and decisions of the Supreme Court. To be sure, they have not been unaffected by the developments on the Court with

17. Neither this statement nor the general discussion of the justiciability doctrines in the text is intended to suggest agreement with all the specific ramifications which have developed under those doctrines or that "stiffening" should necessarily involve merely heightened demand for the same elements which have heretofore been required. The purpose of the discussion is to suggest that this area might deserve further exploration and development, with an eye toward both strengthening and improvement.

which we are concerned. A focus on the political aspect of the Court might be expected to relegate restraints on expression of individual ideas to comparative obscurity. And, as already noted, discussion of a general theory does not require—and may be hampered by—a specific factual context.

Yet for the very reason that these restraints are somewhat removed from the immediate political arena, they contain the seed of possible "institutional controls". Justices who disagree completely on politics may appreciate in common the need for preserving the institutional integrity of the Court[18] and may settle on this means, among others. Recognition that long-run public acceptance of the Court's authority may depend upon such an approach should contribute to common agreement upon enforcement of limiting doctrines. And such agreement today might well sustain the faith that one's successors will similarly bind themselves.

Obviously the question of whether these specific doctrines would serve best is only of secondary significance. It should be clear, also, that no doctrines, or any other "controls", can of themselves bring about greater unity in the Court—particularly since they can only be invoked by the very individuals they would serve to restrain. Such "controls", of any kind, can be effective only after more nearly constant concern over institutional problems has begun. But then they can serve to focus that drive. They can help inform the Bar of the process under way. Successful experience with them can reinforce the original determination to proceed in the given direction. And, perhaps most important, they can provide the common channel to common ends which individuals of otherwise strongly divergent views may agree upon.

The work of the Court will inevitably arouse sharp differences. No amount of dialectic will ever again be able to obscure the fact that these differences frequently stem from different political theories. Nevertheless, agreement on certain institutional goals, expressed in a pattern of operating principles and controls, could help to cut down the frequency of separate opinions and to reduce the "ring" of "personal charge and countercharge", "predilection" and "passion". Such a pattern could in turn aid in the further development of that "institutional awareness and pride" which is essential to maintain and heighten the public prestige of our supreme tribunal.

18. This may conceivably have been the situation—as to a specific problem—in the school segregation cases.

Migratory Divorce

(Continued from page 675)

to confine the scope of the doctrine announced in the case. If the defendant has appeared and participated in the suit for divorce, he cannot thereafter collaterally attack the resultant decree in the courts of a sister state. Thus the *Sherrer* and *Coe* cases went no further than to pronounce the concept that the *defendant* (and, of course, the plaintiff) is the only party bound by the prior litigation in the foreign court.

In view of this hesitancy on the part of the Supreme Court to announce a more comprehensive doctrine, the lawyer may well be justifiably confused; he has found few of his most pertinent questions answered. To those questions which have been answered, the reply has been incomplete. Perhaps one of the most important questions which has arisen out of the *Sherrer* and *Coe* decisions is this: In view of the restrictive scope with which the Court has burdened the *Sherrer* and *Coe* cases, will the finding of domicile made by the Florida or Nevada court bind only the parties who were before the court, or will it be extended so as to bind others? This has been partially answered by *Johnson* v. *Muelberger*.[30]

The full faith and credit clause provides that every state in the Union shall give uniform effect to the decree of her sister states. Under the *Sherrer* doctrine, which is predicated upon the full faith and credit clause and the concept of *res judicata*, a divorce decree rendered by the court before which each of the parties appears and participates, must be recognized, regardless of the absence of bona fide domicile. This applies only to the plaintiff and defendant, neither being permitted to attack the decree in the courts of a sister state. But what is the effect of an attack by a third party challenger?

30. *Id.*

Will the full faith and credit clause render ineffectual his collateral questioning of the foreign decree? In other words, is the law of the state which granted the divorce to govern the standing of the potential challenger, or is the law of the state in which the decree is attacked to control the standing of the third party?[31]

A case, decided in 1951, *Johnson* v. *Muelberger*,[32] has defined the law in this respect. In that case, the husband had a daughter by his first wife; the wife died. The father married again and subsequently his second wife divorced him in Florida, the father in that proceeding entering a general appearance.[33] The father then married a third time. The action in this case was between the daughter, plaintiff, and the father's third wife, the defendant. The father had died, willing all his property to his daughter; the daughter, as sole legatee under the will, was trying to prevent her deceased father's third wife from claiming her widow's statutory share of the estate. The daughter's strategy was to collaterally attack the decree that divorced her father from his second wife, this on the ground of lack of jurisdiction of the Florida court through noncompliance on the part of the second wife with the ninety-day residence requirement. The effect of such collateral attack, if allowed, would be to invalidate the Florida divorce and thus render the subsequent marriage to the third wife void. The third wife would have no legal right to claim a widow's share of the estate. The New York Court of Appeals, arguing that the plaintiff daughter was not, according to New York Law, in privity with her father, allowed the attack.[34] But the Supreme Court of the United States reversed the decision, holding, in effect, that the Florida law was controlling. Since the Florida law would bar the plaintiff daughter's collateral attack, the New York court could not, without denying full faith and credit to the Florida decree, allow the plaintiff to prosecute her attack in the courts of New York. The result, then, of this decision is that the law of the state that grants the decree governs the right of collateral attack in the courts of sister states.

This case extends the doctrine of the *Sherrer* rule. Certain classes of third parties may not now challenge foreign divorce decrees which could not be attacked by the parties whose rights have already been conclusively adjudicated in the foreign court. The Supreme Court, it must be admitted, has indicated only to a very limited extent that category of "third persons" who are barred from collaterally attacking a foreign divorce decree. The Court has gone no further than to bar from attacking the foreign decree both the spouses, plaintiff and defendant, who participated in obtaining the decree,[35] third parties such as second spouses,[36] and the children of the dissolved marriage.[37] The question as to whether third persons other than those mentioned may collaterally attack the foreign decree remains conjectural. In any event, the divorced couple, by looking to the law of the state whose courts rendered the divorce, may now resonably forecast the result of a third party challenger's attack on the decree—thus the divorced parties may feel comparatively sure that their marital obligations which had previously existed one to the other may not be re-established. Further, they need not live in dread of an upheaval which would render nugatory their new marriages and illegitimate the children born of new marriages.

Whatever view the individual adopts, whether in favor of recognition or nonrecognition of migratory divorce, it is obvious that the two views are virtually irreconcilable, neither giving way to the other. The court is confronted on the one side by arguments as to the predominating interest of the state of true domicile and the accompanying sociological interest in discouraging easy divorces. In contradistinction to the latter, there is the predominant interest in favor of certainty in the matter of marriage, legitimacy of children and divorce.

At the present time the trend in the Supreme Court is definitely in favor of liberalization and a greater degree of certainty in the field of migratory divorce. One may reasonably predict that the Court is not likely to retreat to a more conservative position, one which would impede the certainty which has already been achieved by the decisions of *Sherrer* v. *Sherrer* and *Johnson* v. *Muelberger*. If anything, the *Sherrer* and *Johnson* cases will be extended, greater effect being given to the full faith and credit clause in the matter of additional recognition of migratory divorce.

31. It is obvious that if it is the law of the granting state which is to govern, the decree could not likely be attacked, since a finding of domicile has already been made and, in the absence of fraud, such finding would probably be honored.

32. See note 29, *supra*.

33. Under the doctrine of the *Sherrer* case, by his general appearance in the Florida court, the husband thus barred himself from collaterally attacking the decree at any later time.

34. *In re Johnson's Estate*, 301 N. Y. 13, 92 N.E. 2d 44 (1950).

35. *Sherrer* v. *Sherrer* and Coe v. Coe.

36. *Cook* v. *Cook*, 342 U. S. 126, 72 S. Ct. 157 96 L. ed. 94 (1951).

37. *Johnson* v. *Muelberger*.

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